IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF: RAYMOND GARLAND, Petitioner.	NO. 45165-4-II STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

1. Whether the petitioner has failed to establish an adequate factual record to permit review?

2. Whether the petitioner has failed to meet his burden to establish a claim of ineffective assistance of counsel where counsel's defense strategy was a reasonable tactical decision and Garland cannot show prejudice?

3. Whether the petitioner has failed to meet his burden to establish his claim that his trial counsel was ineffective because she allegedly failed to communicate a plea offer to him?

4. Whether the petitioner has failed to meet his burden to show that his appellate counsel was ineffective where his claim on the underlying suppression issue is without merit?

5. Whether the trial court did not abuse its discretion in permitting him to be cross-examined regarding his gang threats to the victim where he denied making them in direct examination?

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6. Whether, contrary to the petitioner's claim, the verdicts were consistent, and even if they were not, he is not entitled to relief?

7. Whether the petitioner fails to meet his burden to show that the court erred when it permitted trial counsel to withdraw prior to sentencing, and Garland was not prejudiced thereby because he personally requested her removal from his case?

B. STATUS OF PETITIONER

Petitioner, Raymond Garland, is incarcerated at the Department of Corrections pursuant to Judgment and Sentence entered in Pierce County Superior Court Cause No. 01-1-03514-4. *See* Appendix A.

C. INCORPORATION OF THE APPELLATE RECORD

The State hereby incorporates by reference the appellate record from the direct appeal, COA# 40945-3-II.

D. FACTS

The following statement of facts, to include both the procedural facts and the facts of the case are copied from the brief of respondent in the direct appeal, COA# 40945-3-II. Where necessary in relation to facts that occurred after the response brief was filed in the appeal, the procedural facts have been supplemented.

1. Procedure

On November 18, 2004, based on an incident that occurred on November 12, 2004 the State charged the defendant, Raymond Garland with: Count I, murder in the first degree; Count II, assault in the first degree; Count III, unlawful possession of a firearm in the first degree; and Count IV, assault in the second degree. CP 1-5. Counts I, II, and IV

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included firearm sentence enhancements. CP 1-5. Count I was alleged to have occurred on the basis of the defendant's engaging in extreme indifference to human life under RCW 9A.32.030(1)(b).

On August 12, 2005 the State filed an amended information that modified the allegation under count I to allege premeditation under RCW 9A.32.030(1)(a) or in the alternative extreme indifference under RCW 9A.32.030(1)(a). CP 14-19. It also amended Count II to murder in the second degree; Count III to assault in the second degree; Count IV to unlawful possession of a firearm in the first degree; Count V to assault in the second degree. CP 14-19. Counts I, II, III, and V included firearm sentence enhancements. CP 14-19.

On January 16, 2007 the State filed a Second Amended Information. CP 54-56. It dismissed Count V by way of omission. *See* CP 56. It also added the middle name of the victim in Counts I and II.

On January 16, 2007 the defendant waived jury trial only as to Count IV, unlawful possession of a firearm in the first degree. CP 57.

A jury was empaneled on January 24, 2007. CP 1476; CP 1460. In the midst of trial on February 16, 2007 the court declared a mistrial after a number of jurors had to be removed and there were insufficient remaining jurors to proceed with trial where the defense was unwilling to stipulate to eleven jurors. CP 1475.

The court empanelled a new jury on August 9, 2007. CP 1484. On September 24, the judge recused herself on the defense motion due to the appearance that the court had concerns about her safety with regard to the defendant and/or his family. CP 1507-08; CP 508-518.

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On January 26, 2009, prior to the third trial, the State brought a motion for sanctions for violations of CrR 4.7 (discovery) where the defense had failed to provide a current witness list, or failed to state the general nature of the defense. CP 673-676. In its response, defense counsel advised that the defense would be the same [as at the two prior trials]. CP 739-50.

On July 29, 2009, the defense indicated that it wanted the court to consider a previously filed motion for dismissal, alleging mishandling of the case by the State, etc. *See* 1 RP (07-29 & 30-09) p. 4, ln. 8-9; p. 15ff. The court denied the defense request, deferring a hearing on the motion to dismiss until after the trial. 1 RP (07-29 & 30-09) p. 31, ln. 17-24.

On August 6, 2009 a jury was empanelled by the Honorable Judge Thomas Felnagle. CP 1509.

Once trial commenced, the defense reserved opening until after the close of the State's case and before it put on its own case. *See* 18 RP 09-16-09, p. 2422, ln. 5-8. In its opening the defense told the jury that the defendant never had a gun, that the victim pulled a gun on Garland who then struggled with the victim, and the gun went off during that struggle. CP 1166, ln. 17-20. This claim was contrary to the claims made by the defense in their opening in the two prior trials. *See* CP 1087-1184. The court allowed the State to conduct a limited impeachment of Garland with opening statements from the first two trials. *See* 27 RP 10-08-09, p. 3740, ln. 1 to p. 3741, ln. 23.

The defense renewed the motion for dismissal at the close of State's case on September 16, 2009. 18 RP (09-16-09) p. 2417, ln. 13.

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On October 26, 2009 the jury was unable to reach a verdict on murder in the first degree as to count I, but did find the defendant guilty of the lesser included offense of manslaughter in the second degree. CP 1343-46. The jury also found the defendant guilty of murder in the second degree in count II and the lesser included charge of assault in the second degree in count III. As to counts I to III, the jury also found that the defendant was armed with a firearm when he committed those crimes. CP 1351-53. With regard to the bench trial on Count IV, the court found the defendant guilty of unlawful possession of a firearm in the first degree. CP 1388-90.

On July 9, 2010 the court sentenced the defendant to a total of 346 months. CP 1399-1412.

The notice of appeal was timely filed on July 12, 2010. CP 1413.

The court of appeals issued an opinion in which they denied Garland's claims and affirmed the conviction. *See* ***State v. Garland***, No. 40945-3-II (2012), published in part at 169 Wn. App. 869, 282 P.3d 1137. *See* Appendix B (Mandate). The mandate issued on September 14, 2012. *See* Appendix B (Mandate).

On July 17, 2013, within the one-year collateral attack time limit, Garland filed in the court of appeals a personal restraint petition. It is to that petition that the State now responds.

2. Facts

On November 12, 2004 Karltin Marcy, his cousin Earl Kenyon Brock, and Kenyon's girlfriend Shelley were at a party at the house of Lisa Loggins for most of the evening. 5 RP (08-13-09) p. 765, ln. 15 to p. 771, ln. 22; 17 RP (09-15-09) p. 2288, ln. 11 to p. 2290, ln. 24. Although Mr. Brock's real first name was Earl, he went by Kenyon. 5

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RP (08-13-09) p. 765, ln. 15; 771, ln. 1-7. They left the party and drove to a bar by the name of Bleacher's. 17 RP (09-15-09) p. 2290, ln. 25 to p. 2292, ln. 7. A number of other people were with them as well. 17 RP (09-15-09) p. 2292, ln. 14-24.

Kenyon and Shelley drove in their own car. 17 RP (09-15-09) p. 2292, ln. 23. They pulled into the parking lot, but Karltin was right behind them. 5 RP (08-13-09) p. 774, ln. 8-12. Kenyon got into an argument with a white male who was in the parking lot. 5 RP (08-13-09) p. 782, ln. 18-24; 17 RP (09-15-09) p. 2294, ln. 20-21. The argument went on for about five minutes. 5 RP (08-13-09) p. 783, ln. 1-2.

Karltin pulled into the lot and parked and was talking to Lisa for a minute when he saw Kenyon arguing with someone. 17 RP (09-15-09) p. 2293, ln. 1-3. There were six people with Karltin and two other white males in the parking lot. 17 RP (09-15-09) p. 2293, ln. 16-19. Karltin got out of the car and walked around to the front and tried to find out what was going on. 17 RP (09-15-09) p. 2294, ln. 9-10.

Timothy Valentine, who was with Kenyon and Karltin, but in a different car, saw Kenyon talking to someone who introduced himself by saying something to the effect of, "What's up man, my name's Ray." 9 RP (08-20-09) p. 1211, ln. 5-13. The person was a white male, wearing baggy clothes, slender, 150 to 160 in weight, a little bit less than six foot, and with a tattoo on his neck. 9 RP (08-20-09) p. 1211, ln.14 to p. 1212, ln. 17; p. 1215, ln. 7-17. The one who identified himself as Ray [Garland] started to get aggressive, making fun of Kenyon for the way he was driving because Kenyon had nudged a telephone pole in the lot when he pulled in. 9 RP (08-20-09) p. 1216, ln. 13-21. Kenyon ignored that and didn't seem to care. 9 RP (08-20-09) p. 1216, ln. 24-25.

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Garland then pulled up the shirt on his arm showed his tattoos and said, "three, six Crip." 9 RP (08-20-09) p. 1218, ln. 3-10. "Crip" is a reference to a gang member. 9 RP (08-20-09) p. 1218, ln. 12-15. Kenyon said, "fuck gangs, fuck you." 9 RP (08-20-09) p. 1219, ln. 1-2. Kenyon's attitude changed when after that Garland called Kenyon a nigger. 9 RP (08-20-09) p. 1217, ln. 1-5.

They [Garland and Kenyon] started to act like they were going to fight, so Karltin grabbed Kenyon and put his arm around Kenyon's neck and told him to come on and pulled Kenyon to come along. 17 RP (09-15-09) p. 2294, ln. 12-13; p. 2295, ln. 4-6. Karltin heard Kenyon say he'd beat him up, or other similar words, but didn't really know what the argument was over. 17 RP (09-15-09) p. 2295, ln. 15-20. Kenyon had started to take his coat off, presumably in preparation to engage in a fight. 7 RP (08-18-09) p. 942, ln. 12 to p. 943, ln. 1.

Karltin heard the person arguing with Kenyon say, "Nigga, this is 26th Street Crip. Fuck you." 17 RP (09-15-09) p. 2306, ln. 1-2. Garland pulled out a gun and shot him [Kenyon]. 9 RP (08-20-09) p. 1223, ln. 1922; 17 RP (09-15-09) p. 2295, ln. 6-7; 7 RP (08-18-09) p. 943, ln. 6-12. No warning was given before the shots were fired. 17 RP (09-15-09) p. 2295, ln. 8-15. Shelley Dominic and Timothy Valentine identified the defendant as the one of the two white males, the one that had the neck tattoo that Kenyon had been arguing with, who shot Kenyon and Karltin. 5 RP (08-13-09) p. 781, ln. 23 to p. 782, ln. 2; p. 802; 9 RP (08-20-09) p. 1255, ln. 9-25.

When the shots were fired, Karltin fell to the ground and everybody else just kind of ran off and was gone. 17 RP (09-15-09) p. 2295, ln. 23-25. Karltin got up off the ground, realizing he had been shot and went into the bar. 17 RP (09-15-09) p. 2295, ln. 25

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to p. 2296, ln. 3; p. 2297, ln. 7-10. When Karltin entered the bar, Kenyon fell over onto a table and Karltin fell down right inside the door and said that he was shot. 17 RP (09-15-09) p. 2295, ln. 25 to p. 2296, ln. 3.

Karltin thought he had been shot in the stomach, because of pains he had there, however, it turned he had been shot in the left testicle. 17 RP (09-15-09) p. 2298, ln. 12-18; p. 2299, ln. 16-19; 2307, ln. 1-6.

On November 12, 2004 Thomas Wheeler was about a block and a half away from his home at Bleacher's Sports Bar in Spanaway after midnight when he was sitting at the first bar stool by the front door. 2 RP (08-10-09) p. 260, ln. 18 to p. 261, ln. 2; p. 262, ln. 12-13. Mr. Wheeler worked for the U.S. Air Force Reserves and civil service and had lived in the Spanaway area for probably 20 years. 2 RP (08-10-09) p. 260, ln. 10-17.

Sitting on the bar stool, Mr. Wheeler heard a commotion behind him and turned around and heard yelling and screaming and tables were flying and people were heading out the back door. 2 RP (08-10-09) p. 262, ln. 12-18. He realized that two men had been shot. 2 RP (08-10-09) p. 262, ln. 18-19. One was holding his throat, heading toward Mr. Wheeler, and he collapsed. 2 RP (08-10-09) p. 19-21. Mr. Wheeler didn't realize a second man had been shot until he saw blood squirting out of what appeared to be his leg. 2 RP (08-10-09) p. 263, ln. 5-6. People were screaming and everyone was heading toward the back of the bar. 2 RP (08-10-09) p. 263, ln. 7-9.

Mr. Wheeler knew most of the people who worked at the bar. 2 RP (08-10-09) p. 14-15. When he realized the other man was shot, the first thing Mr. Wheeler did was get up and ran around the end of the bar because the bartender was six or eight months pregnant, so he grabbed her, went into the kitchen dove in there to protect her and dialed

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911. 2 RP (08-10-09) p. 263, ln.11-16. Mr. Wheeler then grabbed towels, leaned back over the counter and was trying to help the person who was shot in the throat. 2 RP (08-10-09) p. 263, ln. 16-18. After that, Deputies showed up, although Mr. Wheeler couldn't say if it was two minutes, five minutes or ten minutes until they arrived. 2 RP (08-10-09) p. 263, ln. 18-21.

Mr. Wheeler hadn't heard anything [gun shots] before the people came in because the music was too loud. 2 RP (08-10-09) p. 263, ln. 23-25.

On November 12, 2004, Pierce County Sheriff's Deputy Kristine Estes responded to a report of a shooting at Bleacher's Sports Bar in Spanaway. 2 RP (08-10-09) p. 144, ln. 24 to p. 145, ln. 2. As she arrived she saw people leaving the bar and in the parking lot. 2 RP (08-10-09) p. 148, ln. 12-13. When she walked into the bar she saw two black males on the floor, and one of them had a lot of blood near the groin area. 2 RP (08-10-09) p. 148, ln. 13-15.

The murder victim, Kenyon Brock had evidence of two gunshot wounds, one to the chest and one to the right thigh. 3 RP (08-11-09) p. 317, ln. 22 to p. 318, ln. 1.

The Medical Examiner, Dr. Howard, concluded that the cause of Mr. Brock's death was a gunshot wound that went through the sternum or breast bones, continued through the center of the chest, causing damage to the main artery, the aorta, and then continued towards his back and to the right side causing damage to his right lung. 3 RP (08-11-09) p. 335, ln. 7-17. These injuries would have resulted in substantial blood loss, the collapse of a lung and the inability to get air in and out of the lungs because of the bleeding. 3 RP (08-11-09) p. 339, ln. 10 to p. 340, ln. 5. These injuries would result in a rapid death and were

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not medically repairable even if a surgeon had been on scene when they happened, or if Mr. Brock had made it to the emergency room. 3 RP (08-11-09) p. 340, ln. 19-23.

Dr. Howard concluded that the manner of death was homicide, meaning the injury occurred at someone else's hand other than Mr. Brock. 3 RP (08-11-09) p. 357, ln. 12-17. This is because there was no evidence of close range fire, including visible residue, in either gunshot wound. 3 RP (08-11-09) p. 352, ln. 9-24.

E. ARGUMENT.

1. THE PETITION SHOULD BE DISMISSED WHERE THE PETITIONER HAS FAILED TO MEET HIS BURDEN TO ESTABLISH AN ADEQUATE FACTUAL RECORD TO SUPPORT HIS CLAIMS OR THAT HE WAS PREJUDICED.

Defendants may obtain relief under a personal restraint petition (PRP) when they are under restraint that is unlawful. ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 16, 296 P.3d 872 (2013) (citing ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 670-72, 101 P.3d 1 (2004); RAP 16.4(a), (c)). However, a personal restraint petition is not a substitute for direct appeal. ***In re Personal Restraint of St. Pierre***, 118 Wn.2d 321, 328, 823 P.2d 492 (1992) (citing ***In re Personal Restraint of Hagler***, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982)). Therefore, relief under a PRP is limited because collateral attack "...undermines the principles of finality of litigation, degrades the prominence of trial and sometimes deprives society of the right to punish admitted offenders." ***St. Pierre***, 118 Wn.2d at 329. As a threshold matter, a petitioner must establish the appropriateness of collateral review. ***Cook***, 114 Wn.2d at 814.

> The petitioner must state [in his petition] the facts upon which he bases his claim of unlawful restraint and the evidence available to support the factual allegations; conclusive allegations alone are insufficient.

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See ***Yates***, 177 Wn.2d at 18; ***In re Personal Restraint of Williams***, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). "For allegations 'based on matters outside the existing record, the petitioner must demonstrate that he has competent admissible evidence to establish the facts that entitle him to relief.'" ***In re Personal Restraint of Crace***, 157 Wn. App. 81, 94, 236 P.3d 914 (2010), *reversed on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012) (quoting ***Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)). "The evidence must show that the factual allegations are based on more than speculation, conjecture or inadmissible hearsay." ***Crace***, 157 Wn. App. at 95 (quoting ***Rice***, 118 Wn.2d at 886).

"Where the petitioner's evidence is 'based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence.'" ***Crace***, 157 Wn. App. at 94 (quoting ***Rice***, 118 Wn.2d at 886). "The affidavits....must contain matters to which the affiants may competently testify." ***Crace***, 157 Wn. App. at 94-95 (quoting ***Rice***, 118 Wn.2d at 886. These requirements are mandatory and lack of such compliance will result in a refusal to reach the merits of the claim. *See* ***Cook***, 114 Wn.2d at 814 (citing ***Williams***, 111 Wn.2d at 365).

Only after the petitioner has satisfied these threshold requirements does the court then proceed to consider the merits of the claim. In order to establish that he is entitled to relief, the petitioner first has the burden to prove the claimed error by a preponderance of the evidence. ***In re Personal Restraint of Lord***, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Second, the petitioner must establish that he was prejudiced by any error. *See* ***State v. Chambers***, 176 Wn.2d 573, 293 P.3d 1185.

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Restraint may be unlawful for reasons that are constitutional, as well as for reasons that are non-constitutional, and each of these two types of error carries a different burden of proof for the defendant to establish prejudice. *See* ***In re Pers. Restraint of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

PRP challenges based on claims of constitutional error require the petitioner to demonstrate by a preponderance of the evidence that he "was actually and substantially prejudiced by the error." ***In Re Personal Restraint of Davis***, 152 Wn.2d 647, 670, 101 P.3d 1 (2004)). "The court has three options regarding constitutional issues raised in a PRP:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed.
> 2. If a petition makes at least a *prima facie* showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12.
> 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing."

In re Personal Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992) (quoting ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 88, 660 P.2d 263 (1983)).

However, if "the petitioner makes his threshold showing of constitutional error," before granting the petition the court should examine the State's response, which must answer the allegation and "identify all material disputed questions of fact." ***Crace***, 157 Wn. App. at 95 (citing RAP 16.9; and quoting ***Rice***, 118 Wn.2d at 86). To "define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence" and only after the parties' material establish the existence of material disputed issues of fact" will the appellate court direct the superior court to hold a reference

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hearing in order to resolve the factual questions. ***Crace***, 157 Wn. App. at 95 (quoting ***Rice***, 118 Wn.2d at 886-87).

PRP challenges based on claims of non-constitutional error require the petitioner to demonstrate that "the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." ***Cook***, 114 Wn.2d at 813. *See also* ***Crace***, 157 Wn. App. at 94; ***Davis***, 152 Wn.2d at 672.

Here, Garland has provided no exhibits, appendices, or other supplementary materials in support of his petition. He does not include a declaration, copies of the records, a declaration from his trial attorney, etc., all of which would be necessary to support his claims. Thus for any of his claims that involve factual allegations outside the appellate record, he has failed to meet his burden to support his claims with competent evidence.

Most of the claims in Garland's petition should be dismissed as insufficient for review.

For those claims that may be resolved based solely the appellate record, Garland's petition nonetheless also fails on the merits for the reasons explained below. Each of Garland's six claims are considered separately below.

2. GARLAND HAS FAILED TO MEET HIS BURDEN TO ESTABLISH A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S DEFENSE STRATEGY WAS A REASONABLE TACTICAL DECISION, AND WHERE GARLAND CANNOT SHOW PREJUDICE.

The defendant claims his trial counsel's defense strategy was ineffective. Petition at 3ff. That claim is based on the fact that the trial court granted a motion the state brought on October 1, 2009 near the conclusion of the third trial, after Garland took the stand and

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testified as a witness in his own defense, seeking leave to impeach Garland with opening statements defense counsel made in the two prior trials.

Garland's claim is without merit were it was he was present when defense counsel made the statements in opening and never disputed them, and only Garland, could decide if he would ultimately take the stand, and if so, what his testimony would be.

Facts Pertinent To This Issue

The opening statements from the all three trials were not transcribed as part of the report of proceedings for the appeal. *See* 2RP [first trial 01-24-07], p. 184, ln. 25 to p. 185, ln.1; 9RP [second trial 08-21-07], p. 1265, ln. 6-7; p. 1266, ln. 4-5. However, they do appear in the record because the State obtained copies of them and submit them as appendices as part of its motion to use them to impeach Garland with them. CP 1077-1179.

In opening statement in the first trial, defense counsel made the following statements:

> Unfortunately, he [Garland] had a gun. He had a gun. He should not have had a gun, but merely having a gun does not make Ray guilty of Murder. It does not make him guilty of assault in the first degree. CP 1090, ln. 21-24.
>
> And he [Mr. Brock, the victim] started to take off his coat. And that, of course is a manifestation of his intent to engage in a physical fight. As he did that, he pulled out a revolver, a revolver. And he pulled out the revolver and he pointed it at Ray [Garland]. CP 1097, ln. 18-23.
>
> He [Garland] was confident that the gun that was pointed at him by Earl Brock [the victim] would discharge and would kill him. So he took out the gun that he had, and he shot him. CP 1099, ln. 3-5.

August 21, 2007 opening, Ms. Corey made the following statements to the jury.

> Now, it's true that Ray [Garland] had a gun with him at that time. He didn't have a 9 millimeter, but he had a gun. Maybe he shouldn't have had the

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gun, but he had a gun and he needed to use the gun. He needed to use the gun to act in self-defense. CP 1117, ln. 14-18.

Mr. Brock, a large man, took off his coat. His friends were there. They appeared to be – to Mr. Garland, they reasonably appeared to be egging him on, making him want to fight, and then he went for that weapon. He went for a gun. And to Mr. Garland it reasonably appeared that he could not outrun that bullet and that he was going to be shot, so he acted in self-defense. CP 1124, ln. 2-9.

When he saw Mr. Brock reach in and pull out a revolver, you can imagine what he thought. You can imagine a young man out on his birthday facing the barrel of a gun. He defended himself the only way he could. CP 1125, ln. 22 to p. 1126, ln. 1.

In the third trial, in opening defense counsel did not address whether or not Garland possessed a gun himself. Instead, defense counsel stated,

[...] Ray was terrorized by Mr. Brock and Mr. Marcy, who pulled a gun on him in the parking lot of Bleacher's. There was a struggle for the gun. The gun went off. Ray was grabbing the hand of Mr. Brock and Mr. Marcy, trying to keep himself from being shot.

CP 1166, ln. 17-22.

Karltin Marcy, who was behind Earl Brock, gave him [Earl Brock] a firearm. Ray doesn't know much about the firearm, except that it was black and it was just a little bigger than his hand.

CP 1172, ln. 15-18.

Being 21 and perhaps not acting according to the adage that discretion can be the better part of valor, he made a decision to try to struggle for the gun, and so he lunged at Earl Brock – Karltin was there – and they had a physical fight over the firearm.

During this physical fight, Ray was trying to grab Mr. Brock's arm, basically to keep him from doing anything with the firearm. Ray obtained some cuts on his hand that were consistent with the cut that you saw on Mr. Brock's hand at autopsy, caused by the movement of the gun during the altercation.

During this altercation Ray heard a shot. Ray will not be able to tell you how many shots he heard, because he was so close to the firearm in this confined space, and the shot that he heard was absolutely deafening, absolutely deafening. He was so close. He saw a flash, and he heard a shot, and it was right in his ears, and there may have been other shots. Ray

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doesn't know. He just doesn't know, but he knows that there was at least one shot.

During the course of the struggle, then, all of a sudden, after threatening him, you know, calling him homey, saying they were going to kick his ass, that they were going to find him and take care of him over this pretty inconsequential argument about hitting the car, Brock and Marcy left. They just kind of grabbed the gun and they started to run.

Ray didn't know that anybody had been shot. [...]

CP 1172, ln. 15 to p. 1174, ln. 1.

You will recall that Lisa Lambert testified that, if you don't know – if you didn't know Earl very well, you would think he was threatening and you would think he was intimidating. In this case he was more than threatening, he was more than intimidating. He drew a gun on a young man at his 21st birthday. He caused a physical fight. He had a loaded gun, and shots were fired. During the struggle, you know, shots were fired randomly, apparently, although Ray just heard that deafening sound of a single shot.

It was an unfortunate, uncalled-for, violent, intimidating, terrorizing way for Ray to conclude his 21st birthday. He had no intention of hurting anyone. He had no forearm of any type, and he did nothing to provoke this, except to make a comment about how Mr. Brock had nudged the pole when he pulled in.

This was someone looking for a fight, wanting to fight, and Mr. Brock got the fight that he wanted. It's unfortunate, and it's tragic that he died. And everybody will, you know, agree that the loss of any human life is a terrible thing.

On the other hand, Mr. Brock and Mr. Marcy initiated this whole event, and at the conclusion of all the evidence, we believe you are going to find that Ray had no intention to harm anyone. He had no intention to kill anyone. He had no intention to assault anyone. His intention was to make sure that the firearm was not used in any way to hurt anyone. He was not successful in that, but he did what he had to do in that situation. He was trying to protect himself, trying to protect others who were in the parking lot.

[...]

CP 1177, ln. 22 to p. 1179, ln. 2.

On direct examination, Garland gave the following testimony:

Q. At any time, do you recall whether or not Mr. Marcy was in the conversation?

A. Yeah. Mr. Brock turned to him several times and kept saying something like – I think Marcy told him to "handle it" at one point. He kept saying, "Take care of it, "Handle it" – or I'm not sure exactly what Mr.

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Marcy was saying, but it was something to that effect. He was kind of egging him on a bit.

RP 10-01-09, p. 3439, ln. 4-11.

A. Mr. Brock kept turning back to Mr. Marcy and saying, "Let me get that," or Give me that," or something to that effect.
Q. Okay.
A. I was trying to pay attention to him because I had no idea what the hell he was talking about. I just remember those kids of words, "let me get that" or –
Q. Okay.
A. -- something to that effect.

RP 10-01-09, p. 3441, ln. 12-21.

Q. Okay. What happened then?
A. Mr. Brock turned around to Marcy, and Marcy pulled up his shirt and handed him a gun.

RP 10-01-09, p. 3443, ln. 18-20.

Q. Okay. Can you describe what the gun looked like?
A. It was black, and I remember it being bigger than his hand, because I don't remember seeing his hand at that point. I just seen the gun.
Q. Black and bigger than whose hand? Mr. Brock's?
A. Mr. Brocks.

RP 10-01-09, p. 3448, ln. 15-20.

Q. And do you remember, after the gun was produced, what was done with it?
A. Yeah. He pulled it from Marcy and turned his body into me, and at that point, I stuck my hands out to kind of push it away, kind of stop him from putting it on me –
Q. Then what happened?
A. At that point I began to fight. I didn't want to let go of him, not knowing what the hell he was going to do. So we started fighting over the gun.

RP 10-01-09, p. 3449, ln. 1-10.

Q. Okay. And who – I mean, you were diving for the gun, right?
A. I had my hand on his arm, I think, or close to his wrist. I remember grabbing his arm.
Q. With both hands?

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A. Yeah, with both hands, kind of like this.
Q. Okay. Then what do you remember?
A. I remember a shot going off and it being really, really loud, like a percussion, you know, that deafened me. And I remember seeing a flash, and I remember him trying to jerk back and pull away from me. And we both kind of slammed into the cars and started wrestling back and forth.

RP 10-01-09, p. 3449, ln. 16 to p. 3450, ln. 3.

Q. Okay. Were you able to determine whether there was one shot or more than one shot?
A. At that time, there was one shot. I remember seeing, like, two or three flashes during that, but I can't say how many shots. I don't really know how many shots.
Q. Well after the first shot, how was your hearing?
A. Lack thereof. I mean, I don't really have much of a hearing after that. I don't remember hearing too many bangs. I just remember seeing the flashes.
Q. Okay. Now did – how long did this struggle last?
A. Seconds. I mean, it was quick. It wasn't very long – we can talk about it here, but it didn't happen as I talk about it now. It happened really quick.

RP 10-01-09, p. 3451, ln. 19 to p. 3452, ln. 11.

On cross-examination, Garland stated it was a struggle over one gun and that he did not have his own gun that night. RP 10-01-09, p. 3469, ln. 21 to p. 3470, ln. 17. At that point, outside the presence of the jury, the State moved to be allowed to impeach Garland with the inconsistent statements of his attorney in the two prior trials. RP 10-01-09, p. 3470, ln. 23-25.

The parties presented argument on the issue o October 8, 2009, and the court ruled that the state was entitled to use trial counsel's prior opening statements to impeach Garland where he was present for them and did nothing to dispute, disavow, or correct them.

Garland's claim that trial counsel was ineffective is without merit.

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First, as defense counsel pointed out, none of the either party presented to the court expressly held that a defendant could be impeached with a statement of counsel from a prior trial. So that was an open question of law, which the court could have interpreted differently, and with which the court could have agreed with the defense. For that reason, alone trial counsel's conduct was a sound tactical decision, not unreasonable, and not ineffective.

Further, understood correctly, the problem for the defendant really did not arise with the change in defenses, but rather with the original opening statements of trial counsel. It is at the change in defense that the defendant's problem became apparent. However, at the time that trial counsel's statements were made, they were not unreasonable, even if they were in fact incorrect.

While it may not occur to appellate attorneys, it is actually not uncommon for trial counsel not to discuss the defendant's culpable actions with the defendant. This can be the case for a number of reasons that are worth reviewing. First, many defendant's are mistrustful of their attorneys, who after all, are officers of the court, and are not simply shills who carry out whatever the defendant directs. The role of defense attorneys is to provide advice, and to represent the defendant through the proceedings, but to do so in a manner that comports with their ethical obligations as officers of the court. Many, if not most defendants however, view it differently and feel that their attorney's role is to do whatever is required to prevent the defendant being convicted, whether it is ethical or not. Attorneys cannot suborn perjury, they cannot withhold exculpatory evidence, much less destroy it, nor can they even advise the defendant on how to do so. Nor are attorney-client communications protected when they relate to future, rather than past crimes.

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The difference in views as to the role of trial counsel for defendants can lead to significant tension and mistrust between the attorney and the client. For these and other reasons, many defense counsels at the trial level will not ask the defendant what they did, because doing so can amount to asking the defendants to implicate themselves, which many deeply distrust. Additionally, defendants will not infrequently give their attorney a false account of the incident in an attempt to convince the attorney that they are innocent in the hope that it the attorney will be more zealous on the clients' behalf if the attorney believes them innocent rather than guilty.

Attorneys will often not ask for the client's account of the incident is that if the attorney can't be confident the client is giving a true account in the first place, it can undermine the attorney's ability to represent the client later in the process if the client's account changes, because the attorney now has to worry about which version might be true and which false, because if the defendant exercises the defendant's right to testify, the defense attorney cannot ethically direct the examination if the client is giving what the attorney believes to be a false version of events.

The other significant reason that defense trial counsel will not ask the for the client's account of what happened in the case is that the State has the burden of proof, and the defense attorney needs to be able to focus on the evidence available to the State in order to prove its case. Having the defendant's version can lead to the attorney to become so vested in demonstrating that version that they can get bogged down in competing narratives and trying to demonstrate the defendant's version of the case, thereby losing sight of the State's burden and weaknesses in the State's case.

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The decision not to inquire of the client as to the client's version of the crime is not only a sound tactical decision, it is a commonplace one. Even where a defense attorney does not inquire as to the potentially inclupatory details of the charged crime, the attorney may still confer with the client about many of the other aspects of the case. The attorney will often make a decision about the level of inquiry to the client based upon interactions with the client and the evidence in the case.

Under the facts of this case, it appears likely that Garland's trial counsel's opening statements in the first two trials was made in reliance upon the evidence presented in discovery, as those statements fairly closely match the State's evidence, and differs only as to the inference of Garland's intent to be drawn from the differing evidence. However, both of those trials ended before the State rested its case, and before the defense had to put on a case. In the third trial, for the first time the State presented its entire case and rested and the defense was faced with presenting their case.

The defense opening in the third trial was markedly different from the first two, and substantially similar to Garland's testimony. The reasonable inference is that at some time after the defense opening in the second case and the defense opening in the third trial, Garland related his version of the events to his trial counsel. If she knew that he likely wished to testify to his version of the events, and she had no reason to believe he was lying about them, it was not unreasonable for her to adjust her defense to one consistent with his statements. To have not done so would have undermined Garland's testimony far more and been far more damaging to his case.

The problem for Garland is not that his defense changed for the third trial. Nor is it even that his attorney's statements in the first two openings were inconsistent with his

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testimony. The only reason a problem arose for Garland is because he did not repudiate his attorney's statements in the first two trials, yet he testified to something different in the third.

Where Garland had the opportunity to sit through all three trials, the jury could reasonably infer that his testimony in the third trial was tailored as a result of his observations. That was not the fault of his attorney. It was Garland's fault, either because he didn't speak up and disavow the statements in the first two trials, or because in the third trial he gave a false account in the third trial. Necessarily one or the other had to occur. The problem was with Garland's conduct, not with his attorney's representation.

Garland has failed to meet his burden to demonstrate that trial counsel was ineffective. He claims that "a flawed trial strategy resulted in impeachment regarding statements made by my counsel [...] in prior trials. Petition at 3. However, Garland never asserts what about counsel's trial strategy was flawed. In fact it was not flawed. It merely changed. That can happen as a case develops, or when counsel becomes aware of new and different information.

There is no evidence that Garland's trial counsel mislead anyone. If Garland's testimony was true, it was a proper and well advised tactical decision for counsel to change the factual basis of the defense. If Garland's testimony was not true, it is not the fault of his attorney that the defense backfired. Ultimately, trial counsel is limited by the available facts at the time the defense is to be presented. The facts available to defense counsel at any given point can often include significant ambiguities. Garland has failed to show that counsel did anything other than present the best defense available at the time based upon the facts available to counsel at that point. That the defense at the original trial became

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untenable by the third as a result of Garland's testimony is not evidence of ineffective assistance of counsel.

Indeed, Garland's real problem is that other than his own self-serving testimony there was overwhelming evidence of his guilt, and no credible evidence of his version of events. The jury convicted Garland of murder because he in fact committed murder. Because the evidence was overwhelming that Garland indeed committed the murder, no defense was going to be particularly good because there just wasn't a strong defense. Trial counsel made the best of a weak position that changed over time, primarily because of Garland's own testimony.

Garland has failed to cite any authority that holds that trial counsel's change in strategy was ineffective under the facts of this case. He fails to meet his burden, and his claim should be denied as without merit.

3. THE PETITIONER HAS FAILED TO MEET HIS BURDEN TO ESTABLISH THAT HIS TRIAL COUNSEL WAS INEFFECTIVE BECAUSE SHE ALLEGEDLY FAILED TO COMMUNICATE A PLEA OFFER TO HIM.

The petitioner claims that his trial counsel was ineffective for failure to communicate plea offer(s) to him. Petition at 15ff. However, the petitioner fails to meet his burden to establish a threshold showing that facts exist to support his claim where the petition is unsupported by any factual evidence other than citations to the appellate record.

The Sixth Amendment to the United States Constitution guarantees defendants the right to have counsel present at all critical stages of criminal proceedings. ***Missouri v. Frye***, ___ U.S. ___, 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012). Such stages are not

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limited to trial and occur at points prior to trial, during the trial itself and at points after trial. *See* ***Laffler v. Cooper***, ___ U.S. ___, 132 S. Ct. 1376, 1385-86, 182 L. Ed. 2d 398 (2012). *See also* ***Frye***, 132 S. Ct. at 1405. Moreover, the right to counsel means the right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On the other hand, one of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. ***Calderon v. Thompson***, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting ***McCleskey v. Zant***, 499 U.S. 467, 491, 111 S. Ct. 1454 (1991)). "Without finality, the criminal law is deprived of much of its deterrent effect." ***McCleskey,*** 499 U.S. at 491(citing ***Teague v. Lane***, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074, 103 L. Ed. 2d 334 (1989)).

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Where the claim is raised in a personal restraint petition (or other form of collateral attack), if the petitioner meets his burden under the test established in ***Strickland v. Washington***, the petitioner has met his burden to show actual and substantial prejudice as

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required in personal restraint petitions. ***In re Personal Restraint of Crace***, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

However, to prevail on this issue, the appellant must also rebut the presumption that the trial counsel's action "can be characterized as legitimate trial strategy or tactics." ***In re Personal Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." ***In re Personal Restraint of Davis***, 152 Wn.2d at 714 (quoting ***McNeal***, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). The defendant can rebut that presumption by proving that the attorney's representation was unreasonable under prevailing professional norms and that the action was not sound strategy. ***Davis***, 152 Wn.2d at 673. Whether counsel's performance was reasonable is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances surrounding it. *See* ***Davis***, 152 Wn.2d at 673.

It is probably worth mentioning that an alternative three-prong test for ineffective assistance of counsel that was adopted in a number of earlier court of appeals' opinions was rejected by the Washington Supreme Court as not sufficiently deferential to the strong presumption that counsel rendered effective assistance, and as not properly weighing prejudice. ***State v. Grier,*** 171 Wn.2d 17, 38-39, 246 P.3d 1260

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(2011); ***In re Personal Restraint of Crace***, 174 Wn2d 835, 847, 280 P.3d 1102 (2012). *See also* ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2005); ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006), ***State v. Grier***, 150 Wn. App. 619, 208 P.3d 1221 (2009); ***State v. Smith***, 154 Wn. App. 272, 223 P.3d 1262 (2009), ***State v. Breitung***, 155 Wn. App. 606, 620, 230 P.3d 614 (2010), and ***In re Personal Restraint of Crace***, 157 Wn. App. 81, 109, 236 P.3d 914 (2010).

It well established that as a general rule a defense attorney's failure to convey a formal plea offer to a criminal defendant can constitute ineffective assistance of counsel. *See* ***Frye***, ___ U.S. ___, 132 S. Ct. at 1408-09. *See also* ***State v. James***, 48 Wn. App. 353, 361-62, 739 P.2d 1161 (1987). Exceptions to the general rule likely exist. *See* ***Frye***, 132 S. Ct. at 1408.[1] As the court noted in ***Frye***, the plea bargain process involves the nuanced art of negotiation and is defined to a substantial degree by personal style. ***Frye***, 132 S. Ct. at 1408. For that reason, it is neither prudent nor practicable to impose detailed or overly rigid standards for how plea negotiations should occur. ***Frye***, 132 S. Ct. at 1408.

Even where a petitioner successfully establishes that counsel has failed to convey a formal plea offer in a manner that constitutes ineffective assistance of counsel, the petitioner still has the burden to establish that he was prejudiced by counsel's action. To establish prejudice, defendants must first establish that they

[1] For example, presumably it would not be ineffective assistance for counsel to fail to convey a formal plea offer where the client had specifically directed counsel not to convey offers that don't meet a certain minimal threshold. Similarly, it presumably would not be ineffective assistance for counsel not to convey a plea offer substantially similar to one recently rejected by the client and the client had continued to manifest a lack of interest in offers of that type.

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would have accepted the earlier plea offer [as viewed at the time] had they been afforded effective assistance of counsel. ***Frye***, 132 S. Ct. at 1409. Second, the defendant must demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. ***Frye***, 132 S. Ct. at 1409. Third, the defendant must also show that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. ***Frye***, 132 S. Ct. at 1410.

When a defendant establishes the failure to take advantage of a plea offer due to counsel's ineffective assistance, and instead went to trial, and where the defendant can also show resulting prejudice, there still remains the question of what constitutes a proper remedy. ***Lafler***, 132 S. Ct. at 1388. A proper remedy must neutralize the taint of a constitutional violation, while still not granting a windfall to the defendant, nor needlessly squandering the considerable resources the State has properly invested in the prosecution. ***Lafler***, 132 S. Ct. at 1388-89.

The court in ***Lafler*** noted that where the only prejudice was that the defendant received a longer sentence, the court might simply resentence the defendant. ***Lafler***, 132 S. Ct. at 1389. However, where the defendant is convicted of more serious counts (or additional counts), or sentencing enhancements or statutory minimums come into effect as a result of the jury trial, resentencing may be insufficient, and the proper remedy may be to require the prosecution to re-offer the plea bargain. ***Lafler***, 132 S. Ct. at 1389. Once that is done, the trial court can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. ***Lafler***, 132 S. Ct. at 1389.

Finally, a defendant's bare assertion that trial counsel failed to communicate a plea offer is insufficient to entitle him to relief. In ***James***, the court held that the record was

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insufficient to entitle the defendant to relief where the record did not include competent evidence from the trial attorney who allegedly failed to communicate the plea offer. *See* ***James***, 48 Wn. App. at 359, 364.

Here, Garland has failed to meet his burden to establish his claim of ineffective assistance of counsel. He claims that the only mention of a plea agreement occurred in an *in camera* review at which he was not present. Petition at 16. In support of this statement, he cites to "RP 117." This reference is to 1RP 117 [third trial, 07-29-09].

On July 29, 2009, prior to the third trial, Judge Felnagle reviewed with the parties Judge Buckner's May 9, 2008 "Nunc Pro Tunc Order re: [ruling on] Motions [*in limine*] From The First and Second Trials." 1RP [third trial, 07-29-09] p. 91, ln. 14-25. *See also* CP 554-558. The passage cited by Garland is as follows:

> THE COURT: All right. 14 is the court-ordered in camera review with counsel and Ed Murphy of the plea agreement. So that, apparently, has already been done, right?
> MR. PENNER: In addition we've since sent out the plea agreement in discovery.
> MS. COREY: Correct.
> MR. PENNER: At that time the case was pending, I believe.
> THE COURT: So this is now obviated?
> MS. COREY: Right.
> THE COURT: We don't need to do anything with this?
> MS. COREY: Right.

1RP [third trial 07-29-09] p. 117, ln. 12-25.

Item 14 from Judge Buckner's order provides:

> 14. The court ordered in camera review with counsel and Ed Murphy of the plea agreement with Teresa Schodron, which the defendant sought to receive in the motion in limine no. 8. Oral ruling on January 24, 2007.

CP 556.

On January 24, 2007 the discussion and oral ruling proceeded as follows:

> MS. COREY: Thank you.
> The defendant's next motion is to obtain an order from this court compelling the state to provide complete information regarding any plea

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agreements between the Pierce County Prosecuting Attorney's Office/State of Washington and their witness, Terisha Schodron. She is on their witness list. She is currently charged with, I believe, murder in the first degree in a case where there are multiple defendants. She is obviously going to be a testimonial codefendant because the court has let her out of custody pending trial. I think she is on electronic home monitoring.

Anyone knows when the state lets somebody who is charged with murder out on electronic home monitoring it is because they are currying their favor to obtain testimony at trial. We think it's highly likely that Ms. Schodron enhance her performance in this case in order to further her bargaining position with the state. It's appropriate for the court to require the state to provide all evidence of any plea agreement that exists between the state and this witness.

THE COURT: Ms. Corey, were you aware that the case was also assigned to me as well?

MS. COREY: No, I was not aware of that, but it doesn't affect by [sic] motion. I guess you know about it.

THE COURT: Yes, I know about it, but I do not know what, if any, plea agreement. I was the one who let her out on electronic monitoring.

Who is the prosecutor on that?

MR. PENNER: I think it's Ed Murphy.

Your honor, I can represent to the court that there are no plea arrangements that pertain to this case as to Ms. Schodron. Without knowing firsthand, I expect there is some sort of plea arrangement regarding the other case, but nothing in that plea agreement references this case or ay testimony in this case.

I don't have a problem with handing it over. I don't know if Mr. Murphy has a problem handing it over. If the court wants to order it, that's great. And I'll go talk to Mr. Murphy. If he has a strong objection, I'll ask the court to reconsider it prior to calling her as a witness. I don't have a problem with granting it right now. It will pertain to the other case though. I ask that there be some kind of order that it be kept either with Ms. Corey or in an in-camera review.

MS. COREY: I'm not proposing to release discovery to anybody. I know what my obligation is under the rule. It remains in my exclusive custody. It would be relevant in this trial to show bias or interest. It would be very appropriate and admissible of impeachment evidence, and that's what I would use it for. If we put a copy of the agreement in the record, it could even be sealed so that it would not affect the other cases pending before Your Honor, but it is important evidence and we need to get that in.

THE COURT: I prefer to order an in-camera review with Ms. Corey and Mr. Penner and Mr. Murphy, and I can decide further whether it will go outside of that setting.

MR. PENNER: Thank you, Your Honor. I will make efforts to have that done as quickly as possible.

2RP [trial 1, 01-24-07] p. 161, ln. 6 to p. 163, ln. 16.

The passage the petitioner relies upon pertains to a plea agreement entered into by a potential third party witness. It had nothing to do with Garland and was not an offer to him.

Moreover, Garland completely fails to satisfy his burden on this issue. He has not submitted competent admissible evidence from his trial attorney to support his claim. That evidence could come in the form of a declaration from his attorney, testimony from his attorney, or other documentary evidence from his attorney's file, such as file notes, etc. None of that has been presented here. Garland did not offer any competent evidence to establish what the terms of any such an offer were. More significantly, he has not established a reasonable probability that he would have accepted any such offer at the time it had been made, nor has he established that he was prejudiced by not accepting such an offer. Where he fails to meet even the preliminary threshold requirements by putting forth competent evidence, his claim on this issue should be denied.

The court should be aware that in the process of trying to evaluate this claim, the State reviewed the prosecutor's casefile. It did not contain a record of any plea offer to the petitioner. *See* Appendix C (Declaration of Stephen Trinen). The State also contacted the lead trial prosecutor, who reviewed his email communications with Garland's trial counsel. Among them he found a single email exchange relating to a pre-trial settlement offer of this case.[2] *See* Appendix D (Declaration of Stephen Penner), Exhibit 1.

[2] There were three other exchanges regarding plea negotiations, however, the occurred post-conviction and related to Garland's plea on another case, CA# 04-1-05310-4 with that sentence to run concurrent to his sentence in this case. *See* Appendix D (Declaration of Stephen Penner), Exhibits 2, 3, 4.

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Garland's defense counsel initiated the email exchange, on November 13, 2008, via an email to the Prosecutor with a proposed plea offer, which included, among other things, a statement that Garland's mother was willing to agree not to pursue against the Sheriff's department a section 1983 claim on her and Garland's behalf. The prosecutor responded on November 21, 2008 via email reply with a counter-offer that consisted in part of a plea to Murder 2 [felony murder] with a firearm sentence enhancement and assault 2 with a recommendation of 225 months. On November 25, 2008, Garland's counsel countered that with an offer that Garland plea to manslaughter 1, with an agreed sentence of 189 months. She concluded by saying that she, "...could sell" the counter proposal." That same day the prosecutor responded by reiterating that his first counter-offer really was his last, best offer, and that if Garland wanted to accept the offer defense counsel could go ahead and set a plea date, while if he did not, they could just go to trial.

Where Garland's attorney initiated the plea offer, and indicated that Garland and his mother were willing to waive a tort suit, the clear implication is that she was communicating with him about the plea offer. This is further reinforced when she makes the counter to the prosecutor's offer and tells him that she "...could sell the above proposal."

When this exchange is considered it does not support Garland's claim. It clearly suggests that trial counsel was in communication with Garland regarding a resolution.

Garland has failed to meet his burden to establish competent evidence that entitle him to review of his claim. All he has provided is an after-the-fact, self-serving assertion unsupported by any evidence. As was the case in ***James***, Garland's

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presentation of his claim is insufficient to permit review by this court. *See* ***James***, 48 Wn. App. at 359, 364.

Moreover, Garland has further failed meet his burden where he has done nothing whatsoever to put forth evidence from the time the plea offer was extended to demonstrate that he would have accepted the offer at that time.

For that reason, the claim should be denied.

4. GARLAND HAS FAILED TO MEET HIS BURDEN TO SHOW THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE WHERE HIS CLAIM ON THE UNDERLYING SUPPRESSION ISSUE IS WITHOUT MERIT.

The petitioner claims that the trial court erred when it denied the defense motion to suppress evidence, and that as a result appellate counsel was ineffective for failing to raise it as an issue on appeal. *See* Petition at 8. The petitioner's argument appears to include two claims. First, he generally and vaguely asserts that the evidence was illegally obtained without explaining why it was illegally obtained. Second, in passing he claims that no findings of fact were entered by the court, CrR 3.6 was not complied with, and that dismissal should be the remedy for that error. Petition at 8, 9.

To prevail on a claim of ineffective assistance of appellate counsel, the petitioner has the burden to show that the issue that appellate counsel inadequately addressed actually had merit, and that the petitioner was prejudiced by the failure to raise the issue. ***In re Personal Restraint of D'Allesandro***, ___ Wn. App. ___, 314 P.3d 744 (2013); ***In re Personal Restraint of Netherton***, 177 Wn.2d 798, 306 P.3d 918.

Here, Garland fails to meet his burden as to either requirement.

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To understand this claim correctly, it is necessary to review the law with regard to the trial court's review of warrants for probable cause, particularly in the context of a request for a ***Franks*** hearing.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. ***State v. Fisher***, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also* ***State v. Young***, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."); ***State v. J-R Distribs., Inc.,*** 111 Wn.2d 764, 774, 765 P.2d 281 (1988) ("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant."]. Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. ***State v. Feeman***, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. ***State v. Yokley***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); ***State v. Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. ***State v. Casto***, 39 Wn. App. 229, 232, 692 P.2d 890 (1984) (citing ***State v. Partin***, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting, with approval from ***United States v. Ventresca***, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

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In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. ***State v. Maxwell***, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Generally, the "four corners rule" does not permit challenges to facially valid affidavits establishing probable cause for warrants. *See* ***State v. Moore***, 54 Wn. App. 211, 214, 773 P.2d 96 (1989) (citing ***U.S. v. Bowling***, 351 F.2d 236, 241-42 (6th Cir. 1965)). However, ***Franks v. Delaware*** established a procedure for challenging parts of a warrant that are predicated on an affiant's deliberate falsehoods or statements made with deliberate disregard for the truth. *See* ***State v. Garrison***, 118 Wn.2d 870, 827 P.2d 1388 (19952); and ***Moore***, 54 Wn. App. at 214 (both citing ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). The ***Franks*** hearing was instituted to detect and deter the issuance of warrants based on information gathered as a result of governmental misconduct. ***Moore***, 54 Wn. App. at 214-15 (citing ***Thetford***, 109 Wn.2d at 399). Under the ***Franks*** procedure, a defendant is only entitled to an evidentiary hearing if the defendant first makes a "substantial preliminary showing" that an officer or agent of the State knowingly or recklessly made a statement that was the basis of a court's probable cause finding. ***Moore***, 54 Wn. App. at 214 (***State v. Thetford***, 109 Wn.2d 392, 398, 745 P.2d 496 (1987) and ***Franks***, 438 U.S. at 155).

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Washington has followed the federal standard, and a defendant must show either a material falsehood or a material omission of fact by the officer. ***State v. Chenoweth***, 160 Wn.2d 454, 465, 158 P.3d 595 (2007) (rejecting the argument that Article I, Section 7 of the Washington Constitution demands a standard of mere negligence). Intentional omissions or misstatements occur when the affiant shows "reckless" disregard for the truth. Recklessness is shown where the affiant, "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." ***State v. O'Connor***, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), quoting ***U.S. v. Davis***, 617 F.2d 677, 694 (D.C.Cir. 1979).

> "[S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

O'Connor, 39 Wn. App. at 117.

A defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. ***State v. Hashman***, 46 Wn. App. 211 (1986); ***State v. Stephens,*** 37 Wn. App. 76, 678 P.2d 832 (1984). Even if a defendant were able to prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included. ***State v. Gentry***, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

Courts have applied a similar approach to claims that a warrant is based upon illegally obtained information. *See* ***State v. McReynolds***, 117 Wn. App. 309, 330-331, 71 P.3d 663 (2003); ***State v. Coates***, 107 Wn.2d 882, 735 P.2d 64 (1987). In ***State v. McReynolds***, the court ruled the trial court did not err when it conducted a ***Franks*** hearing and suppressed a series of four warrants because they were tainted by unlawfully obtained evidence, but upheld a fifth warrant because the trial court found that the fifth warrant was

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not tainted by the illegally obtained evidence. ***McReynolds***, 117 Wn. App. 330-31. Similarly, in ***State v. Coates***, the court held that a warrant was valid and affirmed the defendant's conviction where a defendant's illegally obtained statement was included in the probable cause statement for the warrant. ***Coates***, 107 Wn.2d at 886-88.

As the court in ***Coates*** noted, the procedure for review of a warrant containing illegally obtained evidence, is to strike any information from the warrant that is illegally obtained and review the affidavit to determine whether probable cause still exists without the struck material. ***Coates***, 107 Wn.2d at 888. Moreover, the court in ***State v. Thompson*** cited ***Coates*** with approval for precisely this proposition. ***Thompson***, 151 Wn.2d at 807-808 (citing ***Coates***, 107 Wn.2d at 888).

Finally, at a suppression hearing the trial court reviews the magistrate's determination of probable cause in a quasi-appellate capacity. ***Neth***, 165 Wn.2d at 182 (citing ***Young***, 123 Wn.2d at 195). The appellate court is also limited to a review of the four corners of the affidavit's supporting probable cause, so that appellate review consists of reviewing the trial court's legal determination of probable cause *de novo*. *See* ***Neth***, 165 Wn.2d at 182 (citing ***Young***, 123 Wn.2d at 195); ***State v. Chamberlin***, 161 Wn.2d 30, 41 n. 5, 162 P.3d 389 (2007) (quoting ***Ornelas v. United States***, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)); *see also* ***In re Det. of Petersen***, 145 Wn.2d 789, 799, 42 P.3d 952 (2002) (clarifying that the *de novo* standard of review as appropriate for appellate review of the probable cause determinations).

What does matter at both a suppression hearing and on appellate review is the deference given to the decision of the issuing magistrate, because for all intents and

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purposes in the warrant context it is the issuing magistrate that is the judicial authority entitled to find facts and draw inferences.

For this reason, any findings of fact made by the trial court regarding whether or not the declaration supports probable cause would ordinarily be irrelevant, nor are the trial court's conclusions binding upon this court.

While the trial court's findings of fact are normally irrelevant for determinations of whether the declaration supports probable cause, they could be relevant in the context of a ***Franks*** challenge to whether material was properly included or omitted from the declaration in the first place. *See* ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). However, that is only the case where 1) the trial court's concluded that the defense had met its preliminary burden to entitle it to a ***Franks*** hearing, and 2) the trial court's decision to grant or deny the suppression hearing was based on the trial court's determination of the facts presented at the ***Franks*** hearing. To the contrary, in those instances where the trial court makes its suppression ruling, not on the basis of the facts presented, but rather as a matter of law, factual findings remain irrelevant and unnecessary.

Facts Relevant To This Issue

On January 17, 2007 the parties had already been assigned to Judge Buckner for the first trial in this case. RP 01-17-07 and 01-18-07, p. 6, ln. 16-17.

On that day, the defense filed what was titled as a motion for a ***Franks*** hearing, and was in fact a motion to suppress evidence obtained as a result of two warrants. CP 63-105. The State filed its response the same day. CP 58-62. On that day the parties were also referred to Judge Felnagle to hear the defense motion because Judge

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Buckner was the magistrate who had approved the issuance of the original warrant, and was therefore precluded from ruling on the motion. RP 01-17-07 and 01-18-07, p. 6, ln. 13-19.

The pleadings do not appear to identify the particular items of evidence sought to be suppressed. *See* CP 63-105, 58-62. The Exhibit Record from the hearing indicates that a copy of return of service was marked for the hearing but never offered or admitted. *See* CP 106-07. In any case, the evidence obtained in the search apparently included among other things, photos showing Garland and LaChapelle holding guns as that what the State sought to admit.

The defense motion was based on a claim that the search warrant applications were fatally flawed because they contained deliberate falsehoods and/or statements made with reckless disregard for the truth. CP 63. Judge Felnagle denied the motion to suppress, holding that even if the omitted statements had been included, probable cause still would have supported the issuance of the warrants. RP [first trial 01-17-07 and 01-18-07], p. 270, ln. 15-19. However, the issue apparently became moot for the time being because the prosecutor apparently indicated subsequently that he wasn't planning on offering evidence obtained in the search. 12RP [third trial 08-26-09], p. 1667, ln. 24 to p. 1668, ln. 25.

On August 26, 2009 during the third trial, Garland's defense counsel was cross-examining Patrick Lachapelle. Patrick Lachapelle had known Garland since the sixth grade when they were in school together, they were best friends, Lachapelle was with Garland and his family at the dinner to celebrate Garland's 21st birthday, and dropped Garland off at the bar on the night Garland ultimately murdered Earl Brock. 12RP

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[third trial 08-26-09], p. 1617, ln. 7 to p. 1619, ln. 9; RP [third trial 10-01-09], p. 3388, ln. 17-21. They were so close that Lachapelle named his son after Garland. 12RP [third trial 08-26-09], p. 1654, ln. 4-14.

On the night of the murder, LaChapelle's girlfriend was eight months pregnant, so he couldn't go out to the bar(s) with Garland, but he did offer to come and pick Garland up if he needed a ride home at some point. 12RP [third trial 08-26-09], p. 1619, ln. 14-25. After the murder, Garland called Lachapelle to pick him up, which Lachapelle did. 12RP [third trial 08-26-09], p. 1620, ln. 18 to p. 1621, ln. 24; p. 1628, ln. 9 to p. 1628, ln. 20.

During cross examination, Garland's trial counsel asked Lachapelle:

Q. Do you recall whether or not Ray had a firearm on him that night?
A. I'm pretty positive he didn't, did not.
Q. Have you ever seen him [Garland] with a firearm?
A. Have not.

12RP [third trial 06-26-19], p. 1626, ln. 19-20. As a result of that statement, the State advised the court that there were pictures obtained from Garland's residence that showed Lachapelle and Garland taking pictures of each other with automatic guns that had not yet been admitted, but that the State wanted to have Lachapelle identify. 12RP [third trial 08-26-09], p. 1667, ln. 14-23. These were apparently photos obtained pursuant to the search warrants that counsel had previously challenged. As a result, defense counsel expressed a desire to re-litigate the ***Franks*** hearing. 12RP [third trial 08-26-09], p. 1668, ln. 3-25.

Instead, at that point, on redirect, but outside the presence of the jury on *voir dire*, the prosecutor presented Lachapelle with the photos and Lachapelle identified himself and Garland in the photos, but claimed that he had no recollection of them

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being taken and that he had never seen Garland with the gun(s). 12RP [third trial 08-26-09], p. 1669, ln. 6 to p. 1672, ln. 25; Exs. 155A to 155C.

On August 31, 2009, the defense filed a new motion to suppress the evidence obtained from the service of the search warrants because there was not probable cause to support the issuance of the warrants. CP 1004-20. The State filed its response on September 2, 2009. CP 1021-26.

The court considered the second suppression motion on September 9, 2009 at which point the defense framed the new motion as a motion for reconsideration. 15RP [third trial 09-09-09], p. 2084, ln. 2-7. The State argued that while its position was that the search was legal, the court needn't reach the legality of the search because independently admissible notwithstanding the legality of the search because defense counsel had opened the door to the admission of the evidence. 15RP [third trial 09-09-09], p. 2079, ln. 12; p. 2097, ln. 7 to p. 2100, ln. 22.

The court denied the suppression motion, concluding that the defense had presented nothing that warranted reconsideration of its earlier ruling, but that even if the evidence was for some reason unlawfully obtained, the evidence was nonetheless admissible for impeachment purposes where defense counsel's examination of Lachapelle and his statement that he had never seen Garland with the guns opened the door to the admissibility of the photos. 15RP [third trial 09-09-09], p. 2109, ln. 9 to p. 2110, ln. 22.

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a. The Court Was Not Required To Enter Findings Of Fact As To Either Of The Suppression Hearings Where The Suppression Motions Were Denied As A Matter of Law.

Findings of fact are unnecessary under the circumstance here because the court denied the suppression motions each time as a matter of law. At the first hearing, Judge Felnagle concluded that even if the omitted statements had been included, probable cause still existed to support the warrant. RP 01-17-07 and 01-18-07, p. 260, ln. 18-25; p. 270, ln. 11-19.

However, controlling in this case is Judge Felnagle's ruling admitting the evidence after the second hearing, because it is as a result of that ruling that the evidence was ultimately admitted. After first reaffirming his earlier ruling he ultimately also admitted the evidence on a separate independent basis. He held the evidence admissible for impeachment purposes notwithstanding whether or not the evidence was lawfully obtained where defense counsel opened the door to the admission of that evidence by the examination of Lachapelle. This ruling superseded any ruling on the legality of the search, was not a ruling on the legality of the search and was made as a matter of law based on the conduct of the case without factual determinations. In other words, the evidence was ultimately admitted on grounds independent of the suppression motion. For that reason, findings of fact were unnecessary.

b. Garland Has Failed To Meet His Burden To Show That The Evidence Should Have Been Suppressed

Garland presents no authority or analysis that demonstrates that the warrants or the resulting searches were at issue here were unlawful. He has certainly failed to show that the court's ruling that the searches were lawful was clearly erroneous, or that the

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suppression issue actually had merit. For that reason has also failed to show that appellate counsel's failure to raise the issue was ineffective. Because he has failed to meet his burden to show error in the admission of the photos, he has also Garland has also failed to meet his burden to show that he was prejudiced.

For all these reasons, Garland has failed to meet his burden to establish ineffective assistance of appellate counsel. Accordingly his claim on this issue should be denied as without merit.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING GARLAND TO BE CROSS-EXAMINED REGARDING HIS GANG THREATS TO THE VICTIM WHERE HE DENIED MAKING THEM IN DIRECT EXAMINATION

Garland claims that the court erred when it allowed the State to cross-examine him regarding his assertion of gang status to Earl Brock. Petition at 11. That claim is without merit where Garland's statements to Brock that he was a Crip was directly relevant to Garland's motive for the shooting, as well as the fact that he, not Brock, initiated the shooting.

Evidence is relevant if, it has "...any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ***State v. Saenz***, 156 Wn. App. 866, 873, 234 P.3d 336 (2010) (quoting ER 401). Relevant evidence is generally admissible, while irrelevant evidence is not. ***Saenz***, 156 Wn. App. at 873 (citing ER 402). However, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ***Saenz***, 156 Wn. App. at 873 (citing ER 403). Still, the threshold for the admissibility of relevant evidence is very low and

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even minimally relevant evidence is admissible. ***State v. Aguilar***, 153 Wn. App. 265, 273, 223 P.3d 1158 (2009).

Evidence of other wrongs or acts is generally inadmissible to prove character of a person to show action in conformity therewith. ***Saenz***, 156 Wn. App. at 873 (citing ER 404(b)). However, evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Saenz***, 156 Wn. App. at 873 (quoting ER 404(b)). Such other purposes are often mistakenly referred to as exceptions, but are in fact merely types of evidence that is not barred by the rule because it falls outside the rule insofar as it is not offered to prove conformity therewith. *See* Tegland, WASHINGTON PRACTICE, vol. 5: EVIDENCE, 5th Ed. § 404.9

Gang evidence qualifies as other bad acts evidence that falls within the scope of ER 404(b). ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009).

A trial court's decision to admit evidence under ER 404(b) is reviewed for a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. ***Saenz***, 156 Wn. App. at 873 (citing ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)); ***Yarbrough***, 151 Wn. App. at 81. The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. ***Saenz***, 156 Wn. App. at 873.

For the reasons explained in what follows, the court properly applied the four-part test in considering whether to admit the gang evidence. However, even if this Court were to hold that the trial court erred in its application of the four-part test, this Court may nonetheless affirm on any ground the record adequately supports even if the

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trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The interpretation of an evidentiary rule is a question of law which the appellate court reviews *de novo*. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). However, when the trial court has correctly interpreted the rule, the trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. ***Foxhoven***, 161 Wn.2d at 174. The trial court abuses its discretion if it exercises it on untenable grounds or for untenable reasons. ***Foxhoven***, 161 Wn.2d at 174. A trial court's failure to adhere to the requirements of an evidentiary rule can constitute an abuse of discretion under some circumstances. ***Foxhoven***, 161 Wn.2d at 174.

"ER 404(b) must be read in conjunction with ER 402 and 403." ***State v. Smith***, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Thus, evidence of other bad acts under ER 404(b) may not be admissible if the probative value is substantially outweighed by the danger of unfair prejudice as limited by ER 403.

Before admitting ER 404(b) evidence, a trial court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

Foxhoven, 161 Wn.2d at 17 (quoting ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). In criminal cases, if it is doubtful whether the probative value of the evidence is substantially outweighed by the unfair prejudice, the scale should be

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tipped in favor of the defendant and exclusion of the evidence. ***Smith***, 106 Wn.2d 772, 725 P.2d 951 (1986).

> ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. ER 404(b) is not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case," but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. In this case, the challenged evidence was offered and admitted "to show a 'common scheme or plan' or to establish [identity via] a particular 'modus operandi.'"
>
> ***Foxhoven***, 161 Wn.2d at 175. [Citations omitted.]

Karltin Marcy testified that as Garland and Earl Brock were arguing, Garland said to Earl Brock, "Nigga, this is 26th Street Crip. Fuck you." 17RP [third trial 09-15-09], p. 2295, ln. 15-16; p. 2306, ln. 1-2. Timothy Valentine testified that as the argument developed Garland showed his tattoos and said "three six Crip." 9RP [third trial 08-20-09], p. 1217, ln. 5-10. Earl Brock responded by saying "Fuck gangs, fuck you." 9RP [third trial 08-20-09], 1219, ln. 1.

When Garland testified, he claimed that Earl Brock noticed his tattoo and commented on it, asking Garland if he was one of the white boys from 3-6. RP [third trial 10-01-09], p. 3437, ln. 20 to p. 3438, ln. 4. Garland didn't know if Earl Brock was also saying "Crip" at that time. RP [third trial 10-01-09], p. 3438, ln. 1-3. Garland testified that he told Earl Brock he was not anything called 3-6. Garland testified that his 26 tattoo was not a "Crip" reference, but rather a numeric code for BF, meaning that he and Lachapelle were best friends. RP [third trial 10-01-09], p. 3436, ln. 3 to p. 3437, ln. 13.

When the State first moved to be able to impeach Garland with evidence that his tattoos were gang references, the court decided to reserve ruling on the issue until

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Garland had further testified on cross-examination and the court could then better assess the relevance of Garland's statements. 27RP [third trial 10-08-09] p. 3771, ln. 8-22.

Ultimately impeachment with additional evidence became unnecessary because later on cross examination, Garland admitted that he did say that he was a "26 bloc Crip." 27RP [third trial 10-08-09], p. 3808, ln. 22 to p. 3809, ln. 5; p. 3814, ln. 18 to p. 3815, ln. 6. The court gave a limiting instruction. 27RP [third trial 10-08-09] p. 3809, ln. 7-13.

Here, the court conducted an analysis of each of the four required steps prior to admitting the evidence. *See* 27RP [third trial 10-08-09], p. 3748ff. Garland ultimately admitted that he made the "Crip" statement, so that is occurred is not at issue. The State sought to admit other "Crip evidence to impeach Garland." However, in light of the potentially admissibility of that evidence, Garland ultimately conceded he made the statement.

The court determined the evidence was relevant to Garland's credibility. *See* 27RP [third trial 10-08-09], p. 3809, ln. 11-12. Garland's credibility was relevant to his account of events, including his intent, so that it was relevant to both his intent as an element of the crimes, as well as his self-defense claim. The court weighed the probative value against the risk of unfair prejudice. 27RP [third trial 10-08-09], p. 3751, ln. 2-5; p. 3771, ln. 1-5.

Ultimately, where Garland gave a false statement regarding the meaning of his tattoo, the trial court did not abuse his discretion in permitting the state on cross examination to impeach Garland regarding that. Garland's statement was relevant to

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his motive in murdering Earl Brock. Moreover, Garland's credibility was particularly significant given his testimony regarding the murder.

Redirect of Lachapelle re: two six crip. 12RP [third trial 08-26-09], p. 1691, ln. 24ff.

6. THE VERDICTS WERE NOT INCONSISTENT, AND EVEN IF THEY WERE IT WOULD NOT ENTITLE GARLAND TO RELIEF.

Garland claims that he should be given a new trial or released from custody because his verdicts were inconsistent. Petition at 13. He then goes on to claim that his convictions for second degree manslaughter, second degree murder, and second degree assault were inconsistent because the state was allowed to argue transferred intent to the jury, in support of which he cites two cases. Petition at 13. That is the extent of his argument on this issue. Garland fails to specify the specific nature of the inconsistency he claims.

His claim on this issue should be denied where it consists of nothing more than a bare assertion and he provides inadequate analysis to permit review of his claim.

Here, the jury found Garland guilty under count I of the lesser included crime of Manslaughter in the second degree for the death of Kenyon Brock. CP 1346. The jury also found Garland guilty as charged under count II of the crime of murder in the second degree for the murder of Kenyon Brock. CP 1347. As instructed, that count included as an element that Garland committed or attempted to commit the crime of assault in the second degree and caused the death of Earl Brock in the course or furtherance thereof. CP 1352. The jury also found Garland guilty in count III of the

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lesser included crime of assault in the second degree for an assault on Karltin Marcy. CP 1349.

At sentencing counts I and II merged for double jeopardy purposes, so that Garland was only sentenced on Count II as the more serious offense. *See* 32RP [trial 3 07-09-10] p. 4283, ln. 24 to p. 4284, ln. 4; p. 4290, ln. 1-12.

The verdict on count I, manslaughter in the second degree was not inconsistent with the verdict on count II, murder in the second degree. None of the elements are inconsistent, and the jury could make a single determination as to how the underlying facts occurred in this case in such a way that both charges would be supported by a single factual scenario. A single interpretation of the underlying facts is sufficient to support both the conviction for manslaughter, and assault in the second degree.

It may be that Garland believes that the finding of second degree murder in count II is inconsistent with the finding of second degree assault in count III because count II contains an element of second degree assault, but count III was predicated on a theory of transferred intent. However, if that is his claim, it too is logically flawed. That is because the second degree assault that forms the basis for the second degree murder conviction is a separate and different assault from the second degree assault in count III. The conviction for the second degree assault in count III was for the injury Karltin Marcy suffered as a result of Garland's shooting of Earl Brock. However, the assault on Karltin Marcy was not the basis of the murder 2 charge, which was rather predicated on the shooting of Earl Brock, which was in itself a second degree assault. Thus the two second degree assaults are different, and for that reason the application of

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transferred intent to count III was not inconsistent because Karltin Marcy was hit incidentally when Garland shot Earl Brock.

One of the two cases Garland relies upon is ***State v. Wilson***, 125 Wn.2d 212, 883 P.2d 320 (1994). Wilson had fired a gun into a tavern after being asked to leave for argumentative behavior. ***Wilson***, 125 Wn.2d at 213-14. His shots missed the intended victims, the bartender and a patron he threatened, but they hit two unintended victims. ***Wilson***, 125 Wn.2d at 213-14. The jury found Wilson guilty of four counts of assault in the first degree, which were charged based on the two intended victims he missed, and the two unintended victims he hit. ***Wilson***, 125 Wn.2d at 214. The court of appeals reversed the two convictions for the unintended victims. ***Wilson***, 125 Wn.2d at 214. The court of appeals had incorrectly held that transferred intent did not apply to the unintended victims under RCW 9A.36.011 if a defendant successfully assaults his intended victim or victims. ***Wilson***, 125 Wn.2d at 219. In doing so, the court of appeals stated:

> There is no reason justifying use of the legal fiction known as transferred intent to prove that Wilson assaulted Hurles and Hensley in the first degree. The State tried, convicted and sentenced Wilson for offenses against his intended victims, the seriousness of which was consistent with his state of mind. It was error for the trial court to allow proof of Wilson's intent to inflict great bodily harm against Jones and Judd to support charges of assault in the first degree against Jones and Judd and against Hurles and Hensley.

Wilson, 125 Wn.2d at 219 (quoting with disapproval the court of appeals opinion in ***State v. Wilson***, 71 Wn. App. 880, 893, 863 P.2d 116 (1993)).

In reversing the court of appeals in ***Wilson*** the Supreme Court held that under the facts of that case a theory of transferred intent was unnecessary because, once the *mens rea* [of intent to inflict great bodily harm] is established the crime can be proven

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and a theory of transferred intent is not necessary if the victim otherwise falls under the other terms and conditions of the statute. ***State v. Wilson***, 125 Wn.2d 212, 219, 883 P.2d 320 (1990). Transferred intent is only applicable where the criminal statute matches specific intent with a specific victim. ***Wilson***, 125 Wn.2d at 219. The court in ***Wilson*** reinstated the two convictions of assault in the first degree that had been vacated by the court of appeals.

However, nothing about the holding in ***Wilson*** establishes that the application of the transferred intent doctrine is improper where there are multiple violent counts with specific violence intended as to one victim and transferred intent as to another. The court in ***Wilson*** merely held that application of the transferred intent doctrine was unnecessary given the plain language of the first degree assault statute.

Moreover, unlike in ***Wilson***, where the defendant was charged with four counts of assault in the first degree, so that the specific intent to inflict great bodily harm was present for each count, here Garland was convicted of murder in the second degree, and assault in the second degree. Murder requires the specific intent [without premeditation] to murder another person. Because of that, the analysis in ***Wilson*** is inapplicable to Garland, and a theory of transferred intent remains applicable. For the same reason, neither are the verdicts inconsistent.

Garland cites a second case in support of this argument, ***State v. Clinton***, 25 Wn. App. 400 (1980). There the court held that a transferred intent instruction was proper. That case involved a single charge of assault, so it is unclear what relevance Garland believes the holding in ***Clinton*** has to this case. Where Garland makes no further argument regarding it, his claim fails.

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Even if the court were for some inconceivable reason to hold the jury's verdicts were inconsistent, Garland is still not entitled to relief.

In ***State v. Ng***, the court held that even where jury verdicts are inconsistent, they will be upheld if the verdict is supported by substantial evidence from which the jury could rationally find the defendant guilty beyond a reasonable doubt. ***State v. Ng***, 110 Wn.2d 32, 45, 48, 750 P.2d 632 (1988) (citing ***United States v. Powell***, 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)). *See also* ***State v. Wilson***, 113 Wn. App. 122, 131-32, 52 P.3d 545 (2002). The court adopted this standard in order to protect considerations of jury lenity and to leave intact the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons. *See* ***Ng***, 110 Wn.2d at 48. This standard also applies to inconsistencies between a special finding and a general verdict. ***State v. McNeal***, 145 Wn.2d 352, 37 P.3d 280 (2002).

Because the verdicts in this case were not inconsistent, and moreover, because even if they were it would not entitle Garland to any relief, his claim on this issue should be denied as without merit.

7. THE FACT THAT GARLAND'S TRIAL COUNSEL WITHDREW FROM THE CASE AFTER TRIAL AND PRIOR TO SENTENCING DUE TO A CONFLICT DOES NOT ENTITLE GARLAND TO RELIEF.

Garland claims he should be given a new trial or released from custody because his attorney was allowed to withdraw from the case after an in camera hearing with the court in which she raised ethical concerns. *See* Petition, p. 14.

That Garland makes this claim in his petition is particularly befuddling where Garland first moved the court to remove trial counsel as his attorney, and the court

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granted counsel's motion to withdraw in part precisely because it was consistent with Garland's request. *See* 30RP [third trial 06-04-10], p. 4228, ln. 21 to p. 4236, ln. 1; RP [third trial 06-08-10], p. 4248, ln. 15-19; p. 4255, ln. 4 to p. 4265, ln. 14. Garland asked the court to remove his trial attorney prior to sentencing. RP [third trial 06-08-10] p. 4248, ln. 9-19.

Garland can't show any prejudice arising from his claimed error of removal of his attorney because the court granted him the relief he personally requested and removed her. Nor does Garland assert, much less demonstrate in his petition that he suffered any prejudice as a result of the removal of his attorney.

Because this issue is wholly without merit where Garland can show no prejudice, his claim on this should be denied.

The State would note that contrary to Garland's claim in his petition, the court did determine whether an actual conflict existed, it just sealed the record as to that review. RP [third trial 06-08-10] p. 4254, ln. 22 to p. 4261, ln. 14. This process was proper. *See* ***State v. Stenson***, 142 Wn.2d 710, 731, 16 P.3d 1 (2001). The court specifically noted that the conflict was a recent development and did not affect trial counsel's prior representation of Garland. RP [third trial] 06-08-10, p. 4261, ln. 15-20.

Because Garland was not prejudiced by the substitution of counsel where he requested such, and where he can show no actual prejudice, this claim is without merit and should be denied.

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F. CONCLUSION

For the foregoing reasons the petition should be dismissed as meritless.

DATED: January 13, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to Petitioner to the petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/13/14
Date Signature

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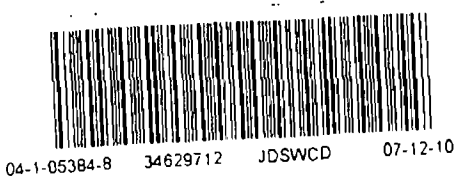
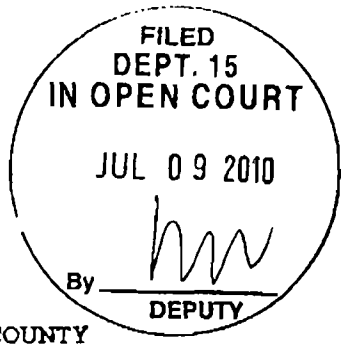
Appendix A
Warrant of Commitment and Judgment and Sentence
Filed 07-09-10





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RAYMOND WESLEY GARLAND, Defendant.	CAUSE NO: 04-1-05384-8 JUL 12 2010 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 7-9-10

By direction of the Honorable

JUDGE THOMAS FELNAGLE
DEPT. 15

KEVIN STOCK
CLERK

By: Chris Hutton
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

JUL 12 2010 Chris Hutton Deputy

FILED
DEPT. 15
IN OPEN COURT
JUL 09 2010
By DEPUTY

STATE OF WASHINGTON
ss:
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this
_____ day of _____, _____.

KEVIN STOCK, Clerk
By: _____ Deputy

mms

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

04-1-05384-8

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RAYMOND WESLEY GARLAND Defendant. SID: WA19600129 DOB: 11/11/1983	CAUSE NO. 04-1-05384-8 **JUDGMENT AND SENTENCE (FJS)** [x] Prison [ ] RCW 9.94A.712 Prison Confinement [ ] Jail One Year or Less [ ] *First-Time Offender* [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Breaking The Cycle (BTC) **[ ] Clerk's Action Required, para 4.5 (SDOSA),4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8**

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 10/26/2009 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
II	MURDER IN THE SECOND DEGREE (D5)	9A.32.050(1)(b)	FASE	11/12/04	PCSD # 04-317-0018
III	ASSAULT IN THE SECOND DEGREE (E26)	9A.36.021(1)(a)	FASE	11/12/04	PCSD # 04-317-0018
IV	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (GGG66)	9.41.010(12) 9.41.040(1)(a)	NONE	11/12/04	PCSD # 04-317-0018

10-9-07994-8

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* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the JURY VERDICT Information

[X] A special verdict/finding for use of firearm was returned on Count(s) II, III RCW 9.94A.602, 9.94A.533.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY (RCW 9.94A.525):**

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ROBBERY 2ND	12/13/01	PIERCE CO.	11/02/01	A	V
2	OTHER CURRENT OFFENSES					

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 **SENTENCING DATA:**

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
II	5	XIV	175 – 275 MOS.	60 MOS.	235 – 335 MOS.	LIFE
III	5	IV	22 – 29 MOS.	36 MOS.	58 – 65 MOS.	10 YRS. $20,000
IV	3	VII	31 – 41 MOS.	NONE	31 – 41 MOS.	10 YRS $20,000

2.4 [ ] **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

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[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN $ TBD/LOC Restitution to: TBD/LOC

$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ _____ Court-Appointed Attorney Fees and Defense Costs

FRC $ 200.00 Criminal Filing Fee

FCM $ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$ _____ Other Costs for: _____

$ _____ Other Costs for: _____

$ 800.00 TOTAL

[X] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] ~~shall~~ be set by the prosecutor.

[X] is scheduled for SEPT 3, 2010 @ 1:30pm DEPT 15

[ ] **RESTITUTION**. Order Attached

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[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than $_____ per month commencing _____. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] **COSTS OF INCARCERATION.** In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $_____.

4.2 [X] **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] **HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 **NO CONTACT**

The defendant shall not have contact with (1) FAMILY OF E. KEVON BROCK (2) KAITLIN MARCY (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for (1) LIFE ~~years~~ (2) 10 YEARS (not to exceed the maximum statutory sentence).

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 **OTHER:** Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

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SerialID: 8CB45BBC-F20F-6452-D973781F536DF8C9
Certified By: Kevin Stock Pierce County Clerk, Washington

4.4a **BOND IS HEREBY EXONERATED**

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

250 months on Count II; 41 months on Count III

24 months on Count IV; _____ months on Count _____

_____ months on Count _____; _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No II; 36 months on Count No III

_____ months on Count No _____; _____ months on Count No _____

_____ months on Count No _____; _____ months on Count No _____

Sentence enhancements in Counts _ shall run
[ ] concurrent [X] consecutive to each other.
Sentence enhancements in Counts _ shall be served
[X] flat time [ ] subject to earned good time credit

Actual number of months of total confinement ordered is: 346 MONTHS

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 2060

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4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] **COMMUNITY CUSTODY** is ordered as follows:

Count II for [redacted] 36 [redacted] _____ Months;

Count III for [redacted] 18 [redacted] _____ Months;

Count _____ for [redacted] _____ [redacted] _____ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenseswhich include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses commited on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant commited a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Defendant shall have no contact with: _____

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Certified By: Kevin Stock Pierce County Clerk, Washington

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:_____

_____

[ ] Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

_____.

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____.

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

_____.

[ ] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

_____

_____

_____

_____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 04-1-05384-8 Date: January 13, 2014
SerialID: 8CB45BBC-F20F-6452-D973781F536DF8C9
Certified By: Kevin Stock Pierce County Clerk, Washington

purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

[ ] Defendant waives any right to be present at any restitution hearing (sign initials): _____.

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

5.8 [ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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Certified By: Kevin Stock Pierce County Clerk, Washington

5.10 **OTHER:** _____

DONE in Open Court and in the presence of the defendant this date: 7.9.10

JUDGE
Print name JUDGE THOMAS FELNAGLE
DEPT. 15

Deputy Prosecuting Attorney
Print name: _____
WSB # 25470

Attorney for Defendant
Print name: Dana Ryan
WSB # 17418

refused
Defendant
Print name: _____

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: refused.

FILED
DEPT. 15
IN OPEN COURT
JUL 09 2010
By _____ DEPUTY

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 04-1-05384-8

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

SHERI SCHELBERT

COURT REPORTER

Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

_____ sex offense
__✓__ serious violent offense
__✓__ assault in the second degree
_____ any crime where the defendant or an accomplice was armed with a deadly weapon
_____ any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary: _____

_____

_____ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: _____

_____

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol; _____

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

_____ (VI) The offender shall comply with any crime-related prohibitions.

_____ (VII) Other: _____

_____

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 04-1-05384-8 Date: January 13, 2014
SerialID: 8CB45BBC-F20F-6452-D973781F536DF8C9
Certified By: Kevin Stock Pierce County Clerk, Washington

IDENTIFICATION OF DEFENDANT

FILED
DEPT. 15
IN OPEN COURT
JUL 09 2010
By _____ DEPUTY

SID No. WA19600129 Date of Birth 11/11/1983
(If no SID take fingerprint card for State Patrol)

FBI No. 233011VB6 Local ID No. NONE

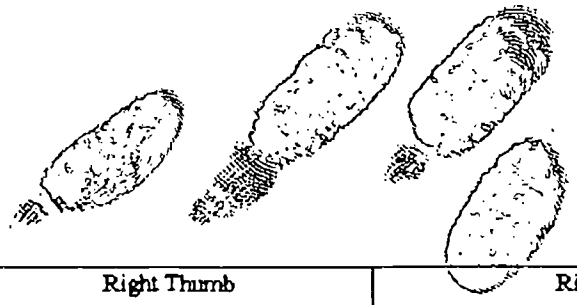
PCN No. 538266175 Other

Alias name, SSN, DOB: RAY GARLAND

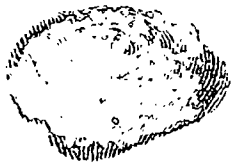
Race:						Ethnicity:		Sex:	
[ ]	Asian/Pacific Islander	[ ]	Black/African-American	[X]	Caucasian	[ ]	Hispanic	[X]	Male
[ ]	Native American	[ ]	Other: :			[X]	Non-Hispanic	[ ]	Female

FINGERPRINTS

Left four fingers taken simultaneously

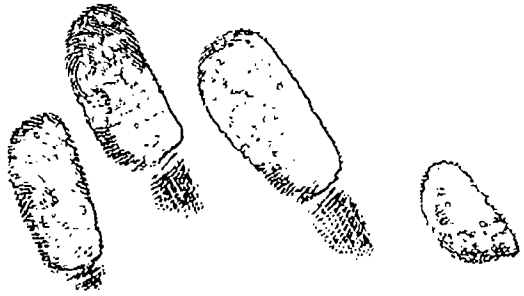


Left Thumb



Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: 7/9/10

DEFENDANT'S SIGNATURE: & Prints Provided by

DEFENDANT'S ADDRESS: defendant in open court.

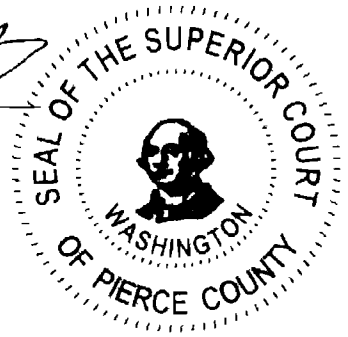
Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Case Number: 04-1-05384-8 Date. January 13, 2014
SerialID: 8CB45BBC-F20F-6452-D973781F536DF8C9
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 13 day of January, 2014

Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.
Dated: Jan 13, 2014 9:43 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
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enter **SerialID: 8CB45BBC-F20F-6452-D973781F536DF8C9**.
This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

Appendix B
Mandate
Issued COA 09-14-12
Filed Superior Court 09-19-12

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

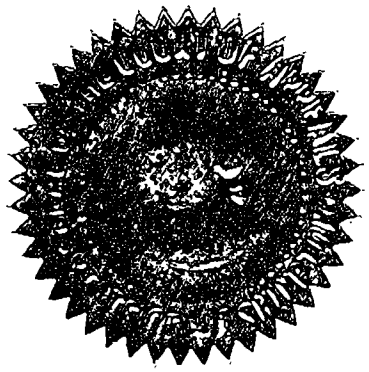
DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND GARLAND, Appellant.	No. 40945-3-II MANDATE Pierce County Cause No. 04-1-05384-8

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on August 8, 2012 became the decision terminating review of this court of the above entitled case on September 10, 2012. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor: State of Washington - $7.65
Judgment Creditor: A.I.D.F. - $39,115.50
Judgment Debtor: Raymond Garland - $39,123.15



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 14th day of September, 2012.

Clerk of the Court of Appeals,
State of Washington, Div. II

Hon. Thomas J. Felnagle

Sheri Lynn Arnold
Attorney at Law
PO Box 7718
Tacoma, WA, 98417-0718
sheriarnold2012@yahoo.com

Stephen D Trinen
Pierce County Prosecutors Ofc
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2102
steve.trinen@co.pierce.wa.us

4034 6/17/2009 640386

Case Number. 04-1-05384-8 Date January 9, 2014
SerialID: 77B8980B-110A-9BE2-A997082008683A0B
Certified By: Kevin Stock Pierce County Clerk, Washington

04-1-05384-8 32267865 AST 06-16-09

FILED
DEPT. 16
IN OPEN COURT
JUN 16 2009
Pierce County Clerk
By DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON Plaintiff -vs- RAYMOND WESLEY GARLAND Defendant	No. 04-1-05384-8 **Criminal Case Reassignment** **[X] For Trial [ ] For Motion Only**

Plaintiff's Attorney	**Defendant's Attorney**
MAUREEN C GOODMAN	BARBARA L. COREY

This matter has been assigned to Department 16, Judge Worswick, in courtroom 210 on the 16 day of June, 2009 at _____ AM/PM.

ALL PARTIES WILL REPORT IMMEDIATELY TO THIS COURTROOM.

Counsel have represented as follows:

1. This trial is estimated to take 2-4 months trial days.
2. Time estimated for pretrial motions is:[ ] less than 1 hour [ ] more than 1 hour w/[ ] oral testimony.

Remarks:_____

3. [ ] State witnesses have been notified and are available to testify.
4. [ ] Defense witness list has been provided to the State.
5. [ ] *All witness interviews have been completed.*
6. [ ] Counsel does/does not anticipate scheduling problems.

Remarks:_____

Sara P. Fleck
Calendar Coordinator

This case is returned to CDPJ for reassignment for the following reason:

_____

Dated this: _____day of_____, 20_____, at _____AM/PM.

_____
Judicial Assistant/Judge

Printed: June 16, 2009 08:43
lxreport.pbl\d_criminal_reassignment_report [rev.2/23/04]

Case Number: 04-1-05384-8 Date: January 9, 2014
SerialID: 77B8980B-110A-9BE2-A997082008683A0B
Certified By Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 09 day of January, 2014

Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.
Dated: Jan 9, 2014 7:57 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
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enter **SerialID: 77B8980B-110A-9BE2-A997082008683A0B**.
This document contains 1 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND WESLEY GARLAND, Appellant.	No. 40945-3-II PUBLISHED IN PART OPINION

VAN DEREN, J. — Raymond Garland appeals his convictions for second degree murder, second degree manslaughter, and second degree assault, all with firearm enhancements, for his participation in a deadly altercation at Bleacher's Sports Bar and Pub in the early hours of November 12, 2004.[1] In the published portion of this decision, we discuss Garland's argument that the trial court erred in allowing the State to impeach him with his counsel's opening statements from two prior proceedings that ended in mistrials. In the unpublished portion, we address his assertion that the trial court violated the appearance of fairness doctrine when it ruled that it would not address his CrR 8.3(b) dismissal motion until after the conclusion of his jury trial. Finding no abuse of discretion or error, we affirm.

[1] The trial court also found Garland guilty of first degree unlawful possession of a firearm after Garland waived his right to a jury trial on that count.

FACTS

On November 11, 2004, Garland celebrated his 21st birthday with family at a Black Angus Steakhouse restaurant.[2] Garland later met friends at Krickets Restaurant and Lounge in Tacoma and, even later, met more people at Bleacher's, another local bar. Shortly after midnight, Garland and a friend, Michael Behe, were talking in the Bleacher's parking lot when several cars pulled in, one of which lightly struck a telephone pole while parking. After Garland made a comment to the driver about striking the pole, an argument ensued.

The driver of the car that struck the pole, Earl "Keyon" Brock, was with his girlfriend, Shelley Dominick, his cousin, Karltin Marcy, Dominick's sister, Lisa Loggins, and another couple, Tim Valentine and Lisa Lambert. Most of them had been drinking, at least moderately, at an earlier party.

Dominick, Marcy, Loggins, Valentine, and Lambert all related that Brock got into an argument with Garland and, shortly thereafter, Brock was fatally shot in the chest and Marcy sustained a bullet wound to the groin. More specifically, Valentine (the most sober person by all accounts) recalled that the shooter had a neck tattoo and that he actually saw the shooter pull a gun from his hip area. Lambert also related that the shooter had a neck tattoo. Nobody but Garland contended that either Marcy or Brock had a gun.[3] Although he denied it at trial, Behe told officers in a taped interview sometime after the incident that Garland was carrying a gun at the time of the shooting.

---

[2] Because numerous trial judges and court reporters were involved in this trial, we refer to the volume number of the Report of Proceedings in the third trial alone (volumes 1 through 32) and all other proceedings solely by date.

[3] Ballistics later confirmed that all the bullets and casings found at the scene came from the same firearm.

After contacting police, both Valentine and Lambert later identified Garland—who has a neck tattoo that reads "Prince Charming"—from a photomontage. 9 Report of Proceedings (RP) at 1215. The lead detective assigned to the case, Pierce County Sheriff's Detective Deborah Heishman, concluded that Garland was a suspect because Valentine and Lambert had both told her that the shooter's first name was "Ray," that he was celebrating his 21st birthday, an anonymous tip corroborated Lambert and Valentine's stories, and another detective identified a Raymond Garland as a possible suspect because Garland turned 21 on November 11, 2004, and matched the descriptions provided by witnesses and the anonymous tip. Marcy also identified Garland as the shooter when later presented with a photomontage.

Police arrested Garland on November 17, 2004, and the State charged Garland with first degree murder, first degree assault, first degree unlawful possession of a firearm, and second degree assault on November 18. RCW 9A.32.030(1)(b); RCW 9A.36.011(1)(a); former RCW 9.41.040(1)(a) (2003); RCW 9A.36.021(1)(c). The State also alleged that Garland committed each of these crimes with a deadly weapon (a firearm), contrary to RCW 9.94A.510. After twice amending the information, the State eventually brought four charges to trial: count I, premeditated murder contrary to RCW 9A.32.030(1)(a) or, in the alternative, murder as the result of extreme indifference to human life contrary to RCW 9A.32.030(1)(b); count II, second degree murder contrary to RCW 9A.32.050(1)(b); count III, first degree assault (for the injury to Marcy) contrary to RCW 9A.36.011(1)(a); and count IV, first degree unlawful possession of a firearm contrary to former RCW 9.41.040(1)(a). The State alleged that Garland committed counts I, II, and III while armed with a deadly weapon, a firearm, contrary to RCW 9.94A.510.

At the first pretrial hearing on March 25, 2005, the trial court addressed a motion from the State "regarding possible disqualification" of the assigned trial judge.[4] RP (Mar. 25, 2005) at 4. After an off-the-record discussion between Garland's attorney[5] and the prosecutor, Garland indicated that he would prefer that the assigned trial judge hear the case, explaining,

> This court and I have had a long-standing relationship, and that relationship has been favorable. My discussions with my client and his family regarding this court handling this case was very positive and very favorable. . . . We are happy to be here. We are desirous that this court hear this matter. I have explained to Mr. Garland and his family several weeks ago when we were assigned here that I viewed this court as a very favorable trial court, and that is the position of all of the parties at this point.

RP (Mar. 25, 2005) at 5-6.

On January 16, 2007, Garland waived his right to a jury trial on the unlawful possession of a firearm charge. Garland's first trial began on January 24. The trial court declared a mistrial on March 23, after the jury had been reduced to 11 members for various reasons.

Garland's second trial began on August 21, 2007, and, again, Garland waived his right to a jury trial on the first degree unlawful possession of a firearm charge. On September 24, Garland asked the assigned trial judge to recuse in light of newly discovered information about the alleged threats to the trial judge from Garland's family and associates. The trial court declared a second mistrial and immediately recused.

---

[4] Although this motion does not appear in the court record, later motions reveal that at this early stage of the trial, there was some indication that either Garland's family or his associates had threatened the assigned trial judge or that the lead detective had conveyed to other law enforcement officers that such threats had been made.

[5] Garland eventually replaced his first attorney, who represented him in the earliest proceedings. His new attorney represented Garland at all three trials—including the third trial through the jury verdict—and withdrew at sentencing.

Garland's third trial began on August 10, 2009. Garland again waived having his unlawful firearm possession charge heard by the jury. On October 26, the jury found Garland guilty of second degree manslaughter, second degree murder, and second degree assault. The jury also found that Garland committed all three of these crimes while armed with a firearm. On May 3, 2010, the trial court found Garland guilty of first degree unlawful possession of a firearm. Garland timely appeals.

ANALYSIS

Garland first argues that the trial court erred in allowing the State to impeach him with his trial counsel's opening statements from the two previous proceedings that ended in mistrials. The State counters that "a statement by an attorney may be attributable to a criminal defendant" for purposes of impeachment "where the defendant was present when the attorney's statement was made and [the defendant] did not attempt to correct or dispute that statement" or, in the alternative, that the statements were "separately admissible as a statement against penal interest by a party opponent under ER 801(d)(2)(i)." Br. of Resp't at 11, 16.

Because this is an issue of first impression in Washington, little precedential authority is available to assist us in making our decision. Nevertheless, the Second Circuit of the United States Court of Appeals has addressed whether defense counsel's prior opening statements can be used to impeach a defendant following a mistrial. We look to the well-articulated reasoning in that decision, *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), and adopt a similar rule: a trial court does not abuse its discretion in allowing the State to impeach a criminal defendant when it has determined, outside the jury's presence, that "the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial" and the inconsistency is equivalent to a testimonial statement by the defendant that is "clear and of a quality which

obviates any need for the trier of fact to explore other events at the prior trial." *McKeon*, 738 F.2d at 33.

I. STANDARD OF REVIEW

We review a trial court's admission of evidence for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). We will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). A decision is "manifestly unreasonable" if the trial court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision "outside the range of acceptable choices." *Rundquist*, 79 Wn. App. at 793. We review the interpretation of evidentiary rules de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

II. IMPEACHMENT WITH COUNSEL'S OPENING STATEMENTS

A. Counsel's Statements in the First Two Trials

In opening statements during the first trial in January 2007, Garland's counsel told the jury, "Unfortunately, [Garland] had a gun. He had a gun. He should not have had a gun, but merely having a gun does not make [Garland] guilty of murder." 6 Clerk's Papers (CP) at 1090. Counsel also argued that Brock

> started to take off his coat. And that, of course, is a manifestation of his intent to engage in a physical fight. As he did that, he pulled out a revolver, a revolver. And he pulled out the revolver, and he pointed it at [Garland].

> . . . .
> [Garland] was confident that the gun that was pointed at him by Earl Brock would discharge and would kill him. So he took the gun that he had, and he shot him.

6 CP at 1097-99. The trial ended in a mistrial before the defense could present its case after the jury had been reduced to 11 jurors.

When the second trial began in August 2007, Garland's attorney again told the jury in opening statements that both Garland and Brock were carrying guns on the night of the incident:

> Now, it's true that [Garland] had a gun with him at that time. He didn't have a 9 millimeter, but he had a gun. Maybe he shouldn't have had the gun, but he had a gun and he needed to use the gun. He needed to use the gun to act in self-defense.
> . . . .
> . . . When he saw Mr. Brock reach in and pull out a revolver, you can imagine what he thought. You can imagine, a young man out on his birthday facing the barrel of a gun. He defended himself the only way he could.

6 CP at 1117, 1125-26. Before the State rested its case, the assigned trial judge declared a second mistrial and recused.

B. Counsel's Opening Statement and Garland's Testimony in Third Trial

During the third trial in August 2009, the defense reserved its opening. In preliminary discussion outside of the jury's presence, the trial court asked whether, in light of Garland's failure to submit proposed jury instructions before trial, "are there going to be any theories that have not been advanced such that the State has to be considering them?" 2 RP at 133. Garland responded that he continued to endorse "general denial and/or a self-defense." 2 RP at 134. When further pressed as to whether any *new* theories would be advanced that the State should be

aware of prior to delivering its opening statement (without the benefit of the defense's proposed jury instructions), Garland again said, "No."[6] 2 RP at 134.

After the State rested, Garland's attorney began her opening statement by stating,

> Good morning, ladies and gentlemen. November 11th, 2004, was, in fact, [Garland's] birthday. [Garland] was 21 that day. It was to be a day of celebration. The day of celebration turned into a horror, a nightmare. [Garland] was terrorized by Mr. Brock and Mr. Marcy, who pulled a gun on him in the parking lot of Bleacher's. There was a struggle for the gun. The gun went off. [Garland] was grabbing the hand of Mr. Brock and Mr. Marcy, trying to keep himself from being shot.

6 CP at 1166. She further stated,

> Karltin Marcy, who was behind Earl Brock, gave [Brock] a firearm. [Garland] doesn't know much about the firearm, except that it was black and it was just a little bigger than his hand. At that time, [Garland] was terrified. He was absolutely terrified. He knew that, in this really confined area between the two cars, with a man with a gun pointing at him, that he really couldn't run. . . .
>
> Being 21 and perhaps not acting according to the adage that discretion can be the better part of valor, he made a decision to try to struggle for the gun, and so he lunged at Earl Brock -- Karltin was there -- and they had a physical fight over the firearm.
>
> During this physical fight, [Garland] was trying to grab Mr. Brock's arm, basically, to keep him from doing anything with the firearm. . . .
>
> During this altercation, [Garland] heard a shot. [Garland] will not be able to tell you how many shots he heard, because he was so close to the firearm in this confined space, and the shot that he heard was absolutely deafening. . . . He was so close. He saw a flash, and he heard a shot, and it was right in his ears, and there may have been other shots. [Garland] doesn't know. He just doesn't know, but he knows that there was at least one shot.
>
> . . . .
>
> [Garland] didn't know that anybody had been shot.

6 CP at 1172-74.

[6] The State also submitted a motion for sanctions in January 2009 for the defense's failure to, inter alia, state the general nature of the defense and whether the defendant would rely on alibi as mandated by CrR 4.7(b)(2)(xii) and (xiv).

Following this surprise change in the defense's theory of the case and, perhaps most importantly, the defense's significantly altered statement of the material facts, the State attempted a number of times to argue about prejudicial discovery violations outside the jury's presence. During one such argument, the trial court commented,

> I think the defense needed to be more up front, even from the get-go, with regard to providing the nature of their defense. I'm not sure that the defense, in this case, has ever truly articulated to the State, before trial, what the nature of their defense was, except in the most general of terms, and I think the Court rules anticipate something more than just kind of across the board you prove it kind of response to the request for discovery, and to state the nature of the defense. And even self-defense may not be sufficient enough if there are specifics of the nature of the self-defense or if it's a case of accident or both self-defense and accident, as to what the dynamics were.

24 RP at 3123. The State refrained from advancing its concerns over the defense change of strategy in any proceedings before the jury.

Toward the end of trial, the defense called Garland as its last witness. Garland testified consistent with the version of facts—the "struggle for the gun" version—presented by his counsel in the defense's opening statement in the third trial, stating that he saw Marcy hand a gun to Brock, the two fought over the gun, at least one shot went off, and he fled without knowing that anyone had been injured. On cross-examination, the following exchange occurred between Garland and the prosecutor:

Q And this was a struggle over one gun, correct?
A It was, yes.
Q You didn't have your own gun that night, correct?
A No, I did not.
Q All right. The gun that you saw Mr. Marcy give to Mr. Brock, that was the only gun you saw that night?
A Yes. That was the only gun I seen [sic] that night.
Q And as far as you know, that's the only gun that went off that night?
A As far as I know, yes.
. . . .

Q So this wasn't a shootout where Mr. Brock had a revolver and you had a semi-auto?
A No. Absolutely not.

26 RP at 3469-70.

C. Impeachment by the State

Immediately after this testimony, outside the jury's presence, the State asked that it "be allowed to impeach Mr. Garland with the prior inconsistent statement of his attorney in two prior trials." 26 RP at 3470. The trial court ruled that it would recess for a week to allow both parties to fully brief the issue.

At the next hearing, the State essentially argued that the defense had changed its theory from self-defense to accident and that the eleventh-hour change unfairly prejudiced the State. The defense steadfastly maintained that it never changed its defense theory and that no authority existed for impeaching a defendant with the opening statements of counsel in an earlier proceeding that resulted in a mistrial. Following argument, the trial court ruled that the State could impeach Garland in highly limited fashion:

> The State characterizes what happened as a change in the defense position. The defense characterizes it as a refinement. First question I ask myself is has there been a legal change in the defense, and I think there probably has, but if there is, it's a fairly minor one, because the line between excusable homicide and justifiable homicide is often an unclear line at best. And when people are struggling over a gun, you could say, well, the gun went off accidentally, making it excusable homicide. Or you could say, in this case, Mr. Garland reached for the gun and intended to grab it and use it in self-defense as the only way he could fend off the attack, and that would be justifiable homicide.
>
> So when you have facts such as this, there is, at least a change from the direction of justifiable to excusable, but I am not sure it's a huge change. But what is a huge change in my opinion is the factual difference in the case. This is not nuance in any way, shape, or form.
>
> The statement in the first case is, he took out the gun that he had, and he shot him. That's speaking of Mr. Garland, took out the gun he had, and he shot him.

Now, in the most recent opening statement, we have [Garland] testifying, or [defense counsel] characterizing the evidence as [Garland] was terrorized by Mr. Brock and Mr. Marcy, who pulled a gun on him in the parking lot at Bleacher's. There was a struggle for the gun. The gun went off. [Garland] was grabbing the hand of Mr. Brock and Mr. Marcy trying to keep himself from being shot.

One situation, they've both got guns. Mr. Garland pulls out a gun and shoots. The other one, no gun in Mr. Garland's hands, and the gun goes off during a struggle. That is a major, significant, non-nuanced change in the case, so it invites impeachment.

Now, is there a policy reason behind this situation? And both sides are claiming, well, there's discovery issues that preclude either one side from using the evidence, or the one side in stopping the use of the evidence. And I find it almost comical to suggest that there's some kind of *Brady*[7] violation for use of your own opening statement that somehow you don't know that you've made an opening statement previously that said a completely different thing than what your client now has testified to? That doesn't fly, in the Court's mind.

. . . .

And you know, I believe there's a bigger argument . . . at stake here, and that's just the fairness and the integrity of this whole system. What if people from the public look in on this case, that know nothing about the history, or anything else, and what will the jurors think in the two cases when they find out, okay, in one case, they say one thing, and then they turn around in the next case and say something entirely different and nobody points it out? That's not fair. That's no way to resolve a legal dispute. That's no way to advance the truth seeking function. These things have to be brought to the jury. You just can't get away with saying one thing and then turning around and saying the almost exact opposite at a later time.

Now, are there attorney-client problems that kind of trump everything I just said? Well, as I indicated in my question to [defense counsel], there aren't any identified in the cases, but then on the other hand the cases don't really discuss the issue either. And I could see that if it were a more nuanced situation, if it were a question truly of refinement, or choosing the wrong words, or something of that sort, that there might be an attorney-client issue, but not here, not when it's this straightforward.

This doesn't invite some discussion of subjective interpretation of words. This is just a situation, there was one version told first time, and there's a completely different version told this time. That doesn't invite some explanation as to nuance.

Then, the final thing is, is there some difference between an opening statement made at a trial that's mistried, and a statement made in the course of pretrial discovery, or other pretrial matters? I would think that it's more clear-cut

[7] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

> in this situation, even than in the cases that are cited by the State. I would think that there's more sanctity, more certainty in what you get up and tell a jury in open court than what you are talking about in a discovery hearing. So I don't think that that argument advances the defense's position. I think, if anything, it undercuts the defense's position.
>
> So, for all the reasons that I have just talked about, I think the State is entitled to make the impeachment, or go forward with the impeachment that they are proposing to a degree.

27 RP at 3723-27.

Following this ruling, the defense argued that it needed a continuance in light of the court's "surprise ruling" because

> I am going to have to testify in response to this impeachment. It's possible that I am going to have to put the two investigators on the stand to affirm that they told me, and that Mr. Garland never discussed with me the facts of the case, and the reason that occurs is this very reason. I haven't discussed the facts with him because I don't want somebody to come back and try to impeach him with that, but that's what the State is going to do, so I am going to have to testify, my two investigators are going to have to testify about how we work, and I mean, that's essential to deal with the cross-examination that the Court is allowing the State to do.

27 RP at 3743. The trial court responded that it would like to hear her offer of proof prior to ruling on a continuance. Defense counsel argued,

> I think I made that, and essentially, the essence of it is that my knowledge of the facts of the case came from an investigator, did not come from Mr. Garland, and that's pretty much the essence. I have relied on the investigators to tell me what the facts were. I have not purposefully asked the defendant about that. So, any theory of the case was my theory of the case, not Mr. Garland's, and Mr. Garland is in no way responsible for the content of that.

27 RP at 3746.

After argument by the State, the trial court pointed out that "defense counsel's got an obligation to have a good-faith belief in the evidence before they say something to the jury"[8] and that

> it's not really the belief of the defense counsel that raises the adoptive admission; it's the fact that Mr. Garland sat quietly in court for cases one and two, and allowed [his] defense attorney, even though the defense attorney may have been in good faith mistaken, to make representations that he now disavows.

27 RP at 3747-48.

Before the trial court ruled on the defense motion for a continuance, the defense brought a motion to reconsider the trial court's impeachment ruling arguing, again, that prior case law did not support such a procedure. After again reminding defense counsel that she had the obligation to tell the truth and have a good-faith belief in all averments made to the jury, the following interaction occurred between the trial court and defense counsel:

> THE COURT: . . . You can't mislead the State, can you? You can't lead them down one path and say, "Oh, aha, now it's really different than what I said." Maybe you don't have an obligation to come forward initially -- and I don't even agree with that proposition -- but you certainly must have an obligation not to speak one thing in an open courtroom setting and then turn around and proffer something completely different the next time you have an opportunity.
>
> [Defense Counsel]: What --
> THE COURT: That's not fair, is it?
> [Defense Counsel]: I think it is.
> THE COURT: Wow.
> . . . .
> THE COURT: What I am ruling is, you can't stand up and say one thing in one trial with the defendant present, and then stand up and say something completely different and him say it too in the next case, without having a consequence as a result. It's not fair. It's a change of position, and he can talk to

[8] Rule 3.3(a) of the Rules of Professional Conduct states, for instance, that a lawyer shall not knowingly "(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer" or "(4) offer evidence that the lawyer knows to be false."

> you and say, you know, we need to talk because what you just said isn't right. You've got an obligation to be fair.
>
> . . . .
>
> . . . To be truthful.

27 RP at 3782-83. Defense counsel did not repeat her request for a continuance, ask that new counsel be substituted for her, or request that the trial court hear from the defense investigators or counsel herself either *in camera* or in court outside the jury's presence to clarify the reasons Garland was entitled to the relief she requested and to explain the basis of the different factual evidence and argument that arose for the first time in the third trial.

After denying defense counsel's motion for reconsideration, trial recommenced with Garland on the stand. The State impeached him as follows:

> Q. All right. So I will ask it again. You were in court on January 24th of 2007, and again on August 21st, 2007 when [defense counsel] made certain statements about the case, correct?
> A. Yes.
> Q. All right. And both of those times [defense counsel] stated that you had your own gun that night, correct?
> A. Yes.
> Q. And both times [defense counsel] stated that Mr. Brock produced a revolver and pointed it at you, isn't that correct?
> A. Yes.
> Q. And both times [defense counsel] stated that you then took out your own gun and shot Mr. Brock; isn't that correct?
> A. Yes, that's correct, she stated that.

27 RP at 3798-99.

After Garland's testimony, the defense rested without calling any defense investigators to clarify or explain the change in the factual representations regarding Garland's possession of a gun on the night of this incident between the statements made in the first two trials and Garland's testimony and counsel's representations in the third trial.

III. IMPEACHMENT BY PRIOR STATEMENTS

A. Washington Law

A witness may be impeached as to their credibility by a prior inconsistent statement. *State v. Classen*, 143 Wn. App. 45, 59, 176 P.3d 582 (2008). This general rule applies with equal force to criminal defendants who testify. *State v. Johnson*, 53 Wn.2d 666, 670, 335 P.2d 809 (1959). "Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true." *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (citation omitted). And as ER 613(b) states,

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 801(d)(2) governs party-opponent admissions. Such admissions are treated somewhat differently as they constitute a special "subset" of prior inconsistent statements. ER 801(d)(2) explains that such admissions are not hearsay when

> [t]he statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Prior inconsistent statements generally do not constitute substantive evidence—they may only be considered to determine witness credibility—whereas party-opponent admissions may be admitted as substantive evidence. *See, e.g.*, *Saldivar v. Momah*, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008).

Although there are no Washington cases directly addressing whether a defendant may be impeached by the opening statements of trial counsel from an earlier proceeding that resulted in a mistrial, both parties acknowledge that *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996), *State v. Dault*, 19 Wn. App. 709, 578 P.2d 43 (1978), and *State v. Acosta*, 34 Wn. App. 387, 661 P.2d 602 (1983), *rev'd on other grounds*, 101 Wn.2d 612, 683 P.2d 1069 (1984), touch on the subject of impeaching a defendant with pretrial or opening statements.

In both *Dault* and *Acosta*, our courts held that defense counsel's statements made at an omnibus hearing were attributable to the defendant as "quasi-admissions" and could be used as prior inconsistent statements for purposes of impeachment if the defendant testified. *Dault*, 19 Wn. App. at 717-18; *Acosta*, 34 Wn. App. at 391-92. *Dault* stressed that

> of considerable importance is the fact that the attorneys' revelations were made in the presence of their clients. Both defendants were present in court at the omnibus hearing. Although the form suggested by [an omnibus hearing] may not be such as would cause the defendants to speak out, they could have consulted with their counsel if in fact the defense was otherwise.

19 Wn. App. at 718.

Rivers extended the reasoning of *Dault* and *Acosta* and held that a trial court did not abuse its discretion in allowing the State to impeach a defendant with remarks made by his attorney in opening argument (of the same trial). *Rivers*, 129 Wn.2d at 709.

Here, Garland contends that the trial court abused its discretion in allowing the State to impeach him with his counsel's opening statements because *Dault*, *Acosta*, and *Rivers* do not specifically address impeaching a defendant with an attorney's opening remarks from a proceeding that resulted in a mistrial. Br. of Appellant at 23 ("Thus, the current state of the law in Washington is that the opening statement made by defense counsel in a criminal trial is admissible to impeach the defendant **in that same trial** if the defendant offers testimony which

contradicts the statements made in opening argument."). In addition to noting this distinction, Garland argues that his defense attorney's remarks involved inconsistent defenses—a situation where impeachment is inappropriate.

As explained in *State v. Williams*, 79 Wn. App. 21, 28-29, 902 P.2d 1258 (1995),

> Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation. Thus, an attorney's statement concerning the litigation sometimes qualifies, when offered against the client, as the admission of a party opponent. *Acosta*, 34 Wn. App. at 392; *State v. Dault*, 19 Wn. App. 709, 715-18, 578 P.2d 43 (1978); *Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 216, 505 P.2d 168 (quoting *Brown v. Hebb*, 167 Md. 535, 175 A. 602, 97 A.L.R. 366 (1934)), *review denied*, 82 Wn.2d 1003 (1973). In criminal cases, however, this rule should be applied with caution, in part due to the danger of impairing the right to counsel. *United States v. Harris*, 914 F.2d 927, 931, 117 A.L.R. Fed. 877 (7th Cir. 1990); *United States v. Valencia*, 826 F.2d 169, 172 (2d Cir. 1987).
>
> Although an attorney's statement may sometimes qualify as an admission of the client when offered against the client, it does not qualify when the attorney is pleading alternatively or inconsistently on the client's behalf.

The State counters that the trial court did not abuse its discretion because ER 613(b) "merely refers to prior statements and does not refer to statements made in trial or opening," essentially arguing that absent the "inconsistent defense theory" situation presented in *Williams*, we should extend the *Acosta/Dault* reasoning to all pretrial (or mistrial) representations made by an attorney on behalf of her client. Br. of Resp't at 18. Moreover, the State asserts that Garland's highly divergent opening statements did not function primarily to give opposing counsel notice of the defendant's proposed theory of the case (as occurred in the *Williams* omnibus hearing) but were directed primarily at the jury. Instead, the opening statements were "legally consistent, reasserting the defense of general denial [and self defense]. . . . The difference was that defense counsel's prior opening statements and Garland's testimony were

factually incompatible with the opening statement and Garland's testimony in the third trial." Br. of Resp't at 21 (alteration in original).

If we were to accept Garland's broad argument, either party could well suffer prejudice by being confronted with substantively different theories *and factual representations* during subsequent trials that presumably address the facts established during discovery, trial preparation, and earlier trial proceedings. Alternatively, under the State's view, clients risk being held responsible for all averments made by their counsel in the course of pretrial litigation or opening statements. Neither outcome is ideal.

B. Federal Case Law Guidance—*United States v. McKeon*

Although neither party briefed the Second Circuit's decision in *McKeon*, it addresses a highly similar set of facts and arrives at a "middle ground" solution to the dilemma of counsel's inconsistent opening statements in subsequent trials.

Following two mistrials, Bernard McKeon was convicted in the Eastern District of New York for conspiracy to export firearms, contrary to 18 U.S.C. § 371. *McKeon*, 738 F.2d at 27-28. On appeal, the Second Circuit considered whether the trial court erred in admitting "into evidence at the third trial . . . portions of the opening statement made by McKeon's lawyer at the second trial." *McKeon*, 738 F.2d at 28.

In the second trial, McKeon's counsel stated in opening that a Xerox machine McKeon and his wife purportedly used in the commission of the crime was not the same type of machine that the State alleged McKeon used to commit the crime. *McKeon*, 738 F.2d at 28. In the third trial, however, McKeon's counsel stated in opening that McKeon's wife had used the Xerox machine with benign intent as a favor to the actual guilty party (one John Moran). *McKeon*, 738 F.2d at 28. Outside the jury's presence, the State successfully moved to introduce portions of the

opening statement in the second trial as party-opponent admissions by his trial counsel imputed to McKeon. *McKeon*, 738 F.2d at 28.

The Second Circuit upheld this decision but in doing so, carefully articulated its reasons. First, the court stated,

> We believe that prior opening statements are not *per se* inadmissible in criminal cases. To hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings. That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact.

McKeon, 738 F.2d at 31.

In refusing to adopt a *per se* rule of inadmissibility, the court reasoned that the evidentiary use of prior jury argument should be circumscribed to avoid conflict with other important public policies:

> First, the free use of prior jury argument might consume substantial time to pursue marginal matters. Some witnesses may be available only at one trial, their testimony may change or other evidence may differ. Trial tactics may also change because of the earlier trial. If prior jury argument may be freely used for evidentiary purposes, later triers of fact will be forced to explore the evidence offered at earlier trials in order to determine the quality of the inconsistency between positions taken by a party. This will result in a substantial loss of time on marginal issues, diversion from the real issues and exposure to evidence which may be otherwise inadmissible and prejudicial.
>
> Second, inferences drawn from an inconsistency in arguments to a jury may be unfair. In criminal cases, the burden rests on the government to present a coherent version of the facts, and defense counsel may legitimately emphasize the weaker aspects of the government's case. Where successive trials occur, the evidentiary use of earlier arguments before the jury may lead to seemingly plausible but quite prejudicial inferences. A jury hearing that in the first trial defense counsel emphasized the weakness of the prosecution's case as to the defendant's criminal intent, may well, when lack of proof of identity is argued at the second, be misled as to the government's obligation to prove all the elements at both trials.
>
> Third, the free use of prior jury argument may deter counsel from vigorous and legitimate advocacy. Argument to the jury is a crucial aspect of any trial, and

the truth-seeking process itself demands that the professional adversaries be allowed to put before the trier of fact all relevant argument regarding the inferences or factual conclusions possible in a particular case. Counsel should not, except when the truth-seeking purpose clearly demands otherwise, be deterred from legitimate argument by apprehension about arguments made to a jury in an earlier trial.

Fourth, where an innocent factual explanation of a seeming inconsistency created by the prior opening statement exists, the offer of that explanation may seriously affect other rights of the defense. Where the explanation may be offered to the trier of fact only through the defendant as a witness, the defendant may have to choose between forgoing the explanation or facing the introduction of a prior criminal record for impeachment purposes and waiver of the attorney-client privilege. Even if defense counsel can offer the explanation in a hearing under Fed. R. Evid. 104(a) outside the presence of the jury, that offer may expose work product, trial tactics or legal theories to the prosecution. These Hobson's choices may thus seriously impair the defense.

Fifth, as is clear from our disposition of this case, the admissibility of a prior opening statement may lead to the disqualification of counsel chosen by the defendant, a most serious consequence.

McKeon, 738 F.2d at 32-33.

In light of its articulated concerns, the court held,

For these reasons, we circumscribe the evidentiary use of prior jury argument. Before permitting such use, the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Speculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted. The inconsistency, moreover, should be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial. The court must further determine that the statements of counsel were such as to be the equivalent of testimonial statements by the defendant. The formal relationship of the lawyer as agent and the client as principal by itself will rarely suffice to show this since, while clients authorize their attorneys to act on their behalf, considerable delegation is normally involved and such delegation tends to drain the evidentiary value from such statements. Some participatory role of the client must be evident, either directly or inferentially as when the argument is a direct assertion of fact which in all probability had to have been confirmed by the defendant.

Finally, the district court should, in a Fed. R. Evid. 104(a) hearing outside the presence of the jury, determine by a preponderance of the evidence that the inference the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation for the inconsistency does not exist. Where the evidence is in equipoise or the preponderance favors an innocent explanation, the

> prior opening statement should be excluded. We impose this requirement so as to allow leeway for advocacy and to lessen the burden of choice between the defendant's not explaining the inconsistency to the jury or sacrificing other valuable rights. Moreover, where the attorney-client privilege, the privilege against self-incrimination, the fear of impeachment by a prior conviction, apprehension over having to change attorneys, the revelation of work product, trial tactics, or legal theories of defense counsel may be involved in explaining the changes in the defendant's version of events, the court should offer an opportunity to the defense to present those reasons *in camera*, outside the presence of the jury and of the prosecution. *In camera* hearings are permitted where the government seeks to use grand jury testimony to overcome the attorney-client privilege or work product immunity, *In re John Doe Corp.*, 675 F.2d 482, 489-91 (2d Cir. 1982), and similar considerations apply in the present circumstances.

McKeon, 738 F.2d at 33.

Although not binding on us, the Second Circuit's proposed rule provides parameters for our analysis.[9] And in applying the Second Circuit's proposed rule to the record here, we see that the trial court carefully concluded that the inconsistency in Garland's opening statements was clear and unambiguous and that Garland had ample time to confirm or deny the assertions in the two years between the second and third trials. Thus, an innocent explanation for the inconsistency of counsel's statements was not apparent to the trial court. And the inconsistency between the statements was of such quality that it obviated any need for the trial court to explore other events at the prior trials. It would also appear that the statements of counsel were such as to be the equivalent of testimonial statements by Garland about the facts surrounding the shooting. Moreover, the trial court made this determination outside of the jury's presence, alleviating some of the concerns raised by both Garland's defense counsel and the *McKeon* court.

[9] Although the Second Circuit chose to treat defense counsel's opening statements as party-opponent admissions (and, therefore, as substantive evidence), this approach would also lend itself to helping courts determine whether prior opening statements should be allowed as inconsistent statements for impeachment purposes.

Here, the record reflects that the trial court gave defense counsel ample time and opportunity to clarify why the factual inconsistencies occurred between Garland's second and third trials. Rather than substantively address whether Garland had a participatory role in this change, ask for an *in camera* hearing,[10] call the defense investigators to the stand outside the presence of the jury (or even in the jury's presence when impeachment was allowed) to clarify the basis of the change in material representations, or withdraw in light of a potential conflict, defense counsel simply reiterated that she thought the law would not allow for impeachment. Losing this argument, she moved on with trial.[11]

Under the *McKeon* analysis, even allowing leeway for advocacy and lessening the burden of choice between Garland not explaining the inconsistency to the jury or sacrificing other valuable rights, the admission of this impeachment evidence was not an abuse of the trial court's discretion.

C. No Abuse of Discretion to Allow Impeachment Here

In considering the *McKeon* analysis and our United States Supreme Court's acknowledgement as early as 1880 that a clear and unambiguous admission of fact made by an attorney in an opening statement could have binding effect on a client, *Oscanyan v. Arms Co.*, 103 U.S. 261, 263, 26 L. Ed. 539 (1880), we hold that it is consistent with Washington law that the trial court's decision in this case to allow limited impeachment was not manifestly

[10] We are confident that defense counsel knew how to utilize an *in camera* procedure and that the trial court was amenable to this process: at sentencing, defense counsel successfully asked the trial court for such a hearing on an unrelated matter.

[11] Garland has not raised an ineffective assistance of counsel claim in this appeal. Thus, we do not address whether a communication breakdown or other tactical decisions leading to Garland's impeachment in trial or whether any of counsel's conduct constituted ineffective assistance. We note that Garland may bring such a claim in a personal restraint petition under RAP 16.4.

unreasonable, exercised on untenable grounds, or involved his adopting a view "that no reasonable person would take." *Lewis*, 115 Wn.2d at 298-99. Accordingly, we hold that the trial court did not abuse its discretion in allowing limited impeachment of Garland through use of his counsel's opening statements of fact in the first two trials.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

APPEARANCE OF FAIRNESS

Garland next argues that the trial court violated the appearance of fairness doctrine in ruling that it would not address his CrR 8.3(b) motion to dismiss the case until after the conclusion of Garland's jury trial. We review a trial court's denial of a motion for dismissal under CrR 8.3(b) for a manifest abuse of discretion, *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), but because Garland fails to support his claim with sufficient evidence of potential bias or legal argument, we only briefly address this argument.

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. "Impartial" means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).[12] When a claimant presents "sufficient evidence of potential bias for the appearance of fairness doctrine to apply,

[12] "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC 2.11(A). This includes instances in which "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in concerning the proceeding." CJC 2.11(A)(1).

we . . . then consider whether [the appearance of fairness doctrine] was violated." *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). "The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial." *Dominguez*, 81 Wn. App. at 330.

Following two mistrials before the originally assigned trial judge and numerous continuances—many requested by Garland's counsel—the trial court opened discussion of Garland's motion to dismiss on the first day the parties appeared before him as follows:

> Now, what I guess I'd like to do next is talk about this: There's a lengthy motion to dismiss that suggests I ought to be hearing from [the prosecutor] as a witness, [the originally assigned trial judge] as a witness, [another judge] as a witness, lots of other people involved in the trial, and it goes into some depth as to the history of the case and the defense's concerns about Mr. Garland's rights to due process, and how the whole procedure has been poisoned by the perceived mismanagement or intentional actions of the State or the State's agents.
>
> Here's my thought on this: I think that we can probably spend another three to six months sorting that out, and I also think that there's a good argument that, if we went down that road, how can I make an intelligent decision when two of my colleagues would be on the witness stand and then the prosecutor would be on the witness stand and a number of the witnesses would be on the witness stand? It absolutely makes no sense to me to deal with this, if at all, pretrial.
>
> I would suggest that, if we are going to have a hearing at all . . . I would think that we would be better served to set this over until after the resolution of the case.

1 RP at 15-16.

The trial court ruled that proceeding to trial immediately was in the best interest of the State *and* the defendant:

> [The defense is] suggesting a massive conspiracy on the part of all sorts of people, including members of the bench, who are my colleagues, and there's certainly nothing to be gained by me doing anything other than jumping off the bench and running back to chambers like a scared rabbit, which is the way [the defense] just characterized one of my colleague's behavior.
>
> That's tempting, and maybe even ultimately appropriate when my colleagues and others in the justice system have been accused of a massive conspiracy. Maybe what we need to do is just say, you know, this case is so

> tainted now that we need somebody from the outside to take a look at it and say do we go forward, or don't we. And even a decision which said we have a deferral of the motion to dismiss might smack of me being a part of the conspiracy.
>
> On the other hand, I have an obligation, I believe, to the integrity of this system from my perspective. And when I see a nearly 1,200-day-old case that has tried to be tried a couple of times, that has such a long and tortured history, I know that the longer it goes, the more of these problems are going to crop up; the more tenuous is the ability of both sides to present the evidence as it needs to be presented; the worse the witnesses' memories become; the more problems that develop. Quite frankly, we are never going to get a fair trial for Mr. Garland if this goes on and on and on. So I am caught on the horns of an obvious dilemma. It's damned if you do, damned if you don't.
>
> We are now here ready for trial. The parties have said they can try this case. If I go the other direction and we end up having a hearing, there is no way it's going to happen quickly. The case is going to be set over and over and over, and the State has the same right as the defendant to have the trial proceed in an expeditious fashion.
>
> I'm of a mind that this is better handled by deferring the motion to dismiss until after the trial. We are going to proceed with the trial. After the trial, we can take up again, the question of what to do with the motion to dismiss.

1 RP at 30-31.

Although Garland argues on appeal that the trial court's oral ruling evinces prejudice against Garland, he fails to flesh this out with citation to authority or meaningful argument on why the trial court's concern with trying the case in a timely fashion to ensure a fair trial for *both* Garland and the State was in any way prejudicial.[13] Having failed to brief this court sufficiently on any authority for finding legal error with the trial court's ruling, we do not further address the merits of this argument. RAP 10.3(a)(6).

Garland fails to establish that the trial court abused its discretion in allowing the State to impeach him at the third trial with his counsel's factually inconsistent opening statements from

[13] Indeed, Garland's only citation to authority in this section of his brief establishes our standard of review in evaluating the appearance of fairness doctrine. Garland utterly fails to provide this court with case law relevant to the circumstances presented by the trial court's discretionary ruling to hear the motion to dismiss after Garland's jury trial.

the previous mistrials or that the trial court violated the appearance of fairness doctrine in deferring hearing on his CrR 8.3(b) motion to dismiss until after trial. We affirm Garland's convictions.

VAN DEREN, J.

We concur:

ARMSTRONG, J.

JOHANSON, A.C.J.

Case Number 04-1-05384-8 Date January 8, 2014
SerialID: 728ECD71-110A-9BE2-A957D1F7905DB9FE
Certified By Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 08 day of January, 2014

Kevin Stock, Pierce County Clerk

By /S/Melissa Engler, Deputy.
Dated: Jan 8, 2014 7:53 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 728ECD71-110A-9BE2-A957D1F7905DB9FE**.
This document contains 28 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

Appendix C
Declaration of Stephen Trinen

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND GARLAND Appellant.	NO. 45165-4-II DECLARATION OF STEPHEN TRINEN

I, STEPHEN TRINEN, declare under penalty of perjury under the laws of the State of Washington, the following is true and correct:

1. That I am a Deputy Prosecuting Attorney (DPA) in the Pierce County Prosecutor's Office assigned to handle this case on appeal.

2. I was assigned to prepare the response to the personal restraint petition in this matter.

3. I have reviewed the prosecutor's office's trial court file for State v. Garland, cause number 04-1-05384-8. I the course of doing so I was unable to find a copy of any

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Main Office: (253) 798-7400

plea offer contained therein, nor was I able to find any notes in the file indicating that a plea offer had ever been extended.

4. I did confer with Stephen Penner, the lead trial attorney assigned to the case. He thought that there had been an exchange about negotiating a plea agreement with defense counsel. He therefore searched his emails and was able to find some pertaining to his communications with defense counsel regarding plea negotiations on cause number 04-1-05384-8. He has prepared a separate declaration regarding those emails. That declaration, contains copies of the email exchanges as exhibits and is included as an appendix to the State's Response to Personal Restraint Petition in State v. Garland, COA# 645165-4-II.

5. Within the Prosecutor's office I have been assigned the appeals unit from 2008 through 2014.

6. Prior to being assigned to the appeals unit, I was assigned as a trial attorney handling criminal prosecutions from October of 2001 through August of 2008.[1] I was also a Rule 9 Intern for the City of Federal Way for two years, from 1997 to 1999.

7. During the period of time when I was assigned to prosecute crimes at the trial court level, I was assigned to misdemeanor crimes until 2004, at which point I was assigned to felony crimes. My felony assignment was to the drug and vice unit, where for a time I was the lead meth lab prosecutor. However, during that time I also participated in the prosecution of homicide cases at the trial court level.

[1] For six months during this period I was briefly reassigned to civil work.

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8. During my tenure as a trial DPA I probably participated in the prosecution of cases at the pre-trial to trial level in at least 3,000 cases, and very possibly as many as 10,000 cases.

9. I have tried dozens of cases.

10. In the course of my trial level practice, nearly all of these cases have involved pre-trial negotiation with defense attorneys.

11. In the course of my trial practice I have routinely had occasion to discuss with defenses counsel the challenges and limitations defense attorneys face in developing trial strategies and dealing with their clients. Normally these discussions have been of a general nature. However, on specific occasions, where it was appropriate for counsel to do defense counsel have discussed these issues with me in regard to particular clients, e.g. in the context of plea negotiations where the discussion has taken place with the agreement of the client.

12. In addition to my regular job duties, I also frequently prepare and give CLE presentations approved by the Washington State Bar Association. This has included several presentations on ethics for criminal attorneys, including ethical issues for defense attorneys to include interactions with their clients.

13. On a number of occasions, in dealing with specific criminal cases, I have been able to recognize and identify potential or actual ethical conflicts criminal attorneys have encountered in the representation of their clients, even before those attorneys have recognized those conflicts themselves. I have been able to explain the problem for the defense attorney so that they have been able to take appropriate corrective action, or

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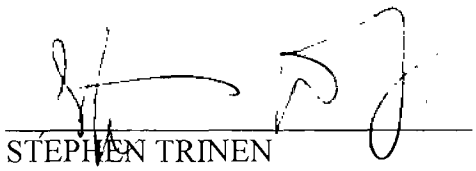
withdraw from the case where required before a greater conflict or actual ethical violation has developed.

14. Because of my criminal trial court experience I am well acquainted with the trial strategies employed by criminal defense attorneys, the realities of the challenges they face and the tactical reasons for the decisions they typically make. I am also familiar with the nature of their interactions with their clients and how their tactical decisions and client interactions are impacted by their ethical obligations under the rules of professional conduct.

Dated: January 13, 2013

Signed at Tacoma, WA.



STEPHEN TRINEN
WSBA# 30925

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Appendix D
Declaration of Stephen Penner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND GARLAND Appellant.	NO. 45165-4-II DECLARATION OF STEPHEN PENNER

I, STEPHEN PENNER, declare under penalty of perjury under the laws of the State of Washington, the following is true and correct:

1. That I am a Deputy Prosecuting Attorney in the Pierce County Prosecutor's Office.

2. I was the lead attorney assigned to handle the prosecution of Raymond Garland at the trial court level under Pierce County Superior Court cause number 04-1-05384-8.

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3. At the request of my colleague Stephen Trinen, I searched my email account on the county email system for any emails relating to plea negotiations or offers to resolve the case with Mr. Garland.

4. As a result of that search I was able to find four email exchanges relating to plea negotiations involving Mr. Garland's case.

5. One of those exchanges related to pre-trial offer for resolution of the case. That exchange is attached as Exhibit 1.

6. The other four email exchanges related to post-conviction plea negotiations. They were directed at resolving a second still pending and unresolved case in which our office was prosecuting Raymond Garland under cause number 04-1-05310-4. The negotiations in those matters pertained to reaching an agreement whereby Raymond Garland would plead guilty to charges on case number 04-1-05310-4 and that would be combined with this case, cause number 04-1-05384-8 for purposes of an agreed sentencing recommendation. Copies of those email exchanges are attached as Exhibits 2-4.

7. I have reviewed the email exchanges in Exhibits 1, and 2 through 4. They are consistent with my recollection of possible plea negotiations in this case. However, they may not be exhaustive, as it is possible that some others of my email messages may have been deleted since Raymond Garland was sentenced. In addition to the emails in Exhibits 1 through 4, there may have been telephone, or in-person conversations that preceded or were supplementary or in addition to the email messages.

8. Given the number of trials, and the length of time over which this case progressed, and the fact that we never reached a plea agreement, I cannot currently recollect all of the particular fine details relating to plea negotiations in this case.

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9. The foregoing statements are true to the best of my knowledge, recollection and understanding as it exists at this time.

Dated: January 13, ~~2013~~ 2014

Signed at Tacoma, WA.

STEPHEN PENNER
WSBA# 25470

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Exhibit 1
Pre-trial email exchange regarding plea negotiations and offer
dated 11-13-08 to 11-25-08

Stephen Penner

From: Barbara Corey [barbara@bcoreylaw.com]
Sent: Tuesday, November 25, 2008 4:33 PM
To: Stephen Penner
Subject: RE: Garland

Happy Turkey Day to you and your family. B

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844
253.779.0846(fax)

-----Original Message-----
From: Stephen Penner [mailto:SPENNER@co.pierce.wa.us]
Sent: Tuesday, November 25, 2008 4:23 PM
To: Barbara Corey
Subject: RE: Garland

I'm sorry, but I just can't reduce it to manslaughter. The Murder 2, etc, offer below really is my last, best offer. If he wants to accept it, go ahead and set the plea date. If not, let's just do the trial.

Have a good Thanksgiving. See you next Friday.

-Penner

>>> "Barbara Corey" <barbara@bcoreylaw.com> 11/21/2008 3:13 PM >>>
OK, not a terribly bad offer. How about we make it manslaughter 1 (offender score of 4) = 111-147 months. Agreed mid-range of 129 plus 60 months.

Agreement the same on the other assault case.

I could sell the above proposal.

Thanks, BC

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844
253.779.0846(fax)

-----Original Message-----
From: Stephen Penner [mailto:SPENNER@co.pierce.wa.us]
Sent: Friday, November 21, 2008 2:43 PM
To: Barbara Corey
Subject: Re: Garland

Okay. I've reviewed the case. I've spoken with Costello. I've sought advice from other DPAs wiser and more experienced than I. Based on all that, and my own best judgment, here is the best I can offer:

04-1-05384-8: Amend to Murder 2 [felony murder] w/ FASE (Brock) and Assault 2, no FASE (Marcy)
04-1-05310-2: Amend to Assault 2, no FASE

Your client has one violent prior (robbery), and the Assault 2's would be two more violent other current offenses. Normally, that would give him an offender score of 6 on the Murder 2, for a range of 195-295, plus 60 months for the FASE, for a total range of 255-355.

However, if he pled and was sentenced first to 04-1-05384-8, his score would only be a 4. His range would then be 165-265, plus 60, for a total of 225-325. I would recommend low end: 225 months (165+60).

Then on 04-1-05310-2, he would have a 6, for a range of 33-43 months, and I would recommend that run concurrently.

So the total time for both cases would be 225 months. Plus usual LFOs, NCOs, etc.

So, that's my offer. Please communicate it to your client and let me know. If you have any questions, don't hesitate to contact me.

Stephen M. Penner
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
tel (253) 798-6787
fax (253) 798-6636
spenner@co.pierce.wa.us

>>> "Barbara Corey" <barbara@bcoreylaw.com> 11/13/2008 8:21 AM >>>
As we discussed, I would welcome the opportunity to discuss a possible resolution of this case. Your civilian witnesses are extremely weak. The police witnesses are not much better.

We have a new witness who will testify that Shelly Dominick stated that she and Lisa Loggins were in the bar when the shooting happened and that Karltin Marcy told them what to say in order to enhance his chances at the civil suit.

Also, my client's appearance was different than it is in the photo montage because he had not shaved his head until AFTER this incident when he apparently decided to adopt a fashion forward look.

I propose manslaughter 2 and dismissal of the other assault case. Ray has been in custody for more than 4 years. There have been two mistrials and, frankly, given the nature of this case, there is potential for another mistrial.

If it matters, Margaret will also agree not to pursue a section 1983 against PCSD on Ray's behalf and her own behalf. This is a legitimate condition for a plea bargain under Rumery v. Newton (or maybe the other way around, Newton v. Rumery) wherein the United States Supreme Court expressly approved such condition.

Thanks, BC

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844

253.779.0846(fax)

Exhibit 2
Post-conviction email exchange regarding plea negotiations on 04-1-05310-4
dated 11-03-09

Steve Trinen

From: Stephen Penner
Sent: Wednesday, January 08, 2014 11:55 AM
To: Steve Trinen
Subject: FW: Garland - Proposal for Settlement

From: Barbara Corey [mailto:bcorey9@net-venture.com]
Sent: Tuesday, November 03, 2009 2:12 PM
To: Stephen Penner
Cc: Maureen Goodman
Subject: RE: Garland - Proposal for Settlement

My client's mother is in Scotland until November 14th. We cannot do anything until she returns.

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844
253.272.9220(fax)

From: Stephen Penner [mailto:spenner@co.pierce.wa.us]
Sent: Tuesday, November 03, 2009 2:09 PM
To: 'Barbara Corey'
Cc: Maureen Goodman
Subject: Garland - Proposal for Settlement

Barbara,

Now that the dust has settled a bit, we've had a chance to look at the other case and the standard ranges on both cases. We'd like to make the following package offer to settle both cases (the numbers assume a conviction on the still pending UPOF 1 count on the murder case):

On 04-1-05310-4:
We would amend charges to Assault 3 & UPOF 1. Drop the firearm enhancement.
He resultant range would be 36-48 months.
The consideration for the reduction is:

- No appeals, collateral attacks, PRPs or other post-conviction relief on either case
- No motions for new trial on 04-1-05384-8
- Withdraw the motion to dismiss on 04-1-05384-8
- Agree to a midpoint sentence of 362 months (incl FASEs) on 04-1-05384-8

We would do the amendment and guilty plea before the sentencing on 04-1-05384-8.
We would then set over sentencing until after the appeal time limit has run on 04-1-05384-8.
Then on this case we do an agreed recommendation of 36 months, concurrent with 04-1-05384-8.

On 04-1-05384-8:
Currently, his range is 271-371 (that includes the 96 months of firearm enhancements).

His new range (with 2 new points from 04-1-05310-4) would be 312-412 (again including the 96 months of firearm enhancements).
The parties agree to a midpoint sentence of 362 months (256 + 96).
And we put on the record our agreement under 04-1-05310-4, including the fact tha allowing the appeal time limit to lapse is intentional and part of the bargain.

If your client appeals or in any other way attacks the convictions or sentences on either case, then we move to vacate plea on 04-1-05310-4 and proceed on the original charges of Assault 1 with a firearm enhancement and UPOF 1.

Please discuss the offer with your client and his family and let us know. It's worth noting that the agreed total 362 month sentence is within your client's standard range anyway just on 04-1-05384-8. Thanks.

Stephen M. Penner
Maureen Goodman
Pierce County Prosecutor's Office

Exhibit 3
Post-conviction email exchange regarding plea negotiations on 04-1-05310-4
dated 11-04-09 to 11-05-09

Steve Trinen

From: Stephen Penner
Sent: Wednesday, January 08, 2014 11:53 AM
To: Steve Trinen
Subject: FW: Garland US

From: Barbara Corey [mailto:bcorey9@net-venture.com]
Sent: Thursday, November 05, 2009 12:24 PM
To: Stephen Penner
Subject: RE: Garland US

I thought we would set the dates for the dismissal motion. I will have the witness list. Per my request, we can do the firearm argument after Margaret returns from Scotland.

Another issue to consider is what role Ray's dual citizenship plays. As you know, his a citizen of both the US and the UK. I am sure that you have complied with the Vienna Convention requirements on this. We have been contacting them about the possibility that Ray could serve his sentence in the UK? What are your feelings about that?

Thanks, B

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844
253.272.9220(fax)

From: Stephen Penner [mailto:spenner@co.pierce.wa.us]
Sent: Thursday, November 05, 2009 11:50 AM
To: 'Barbara Corey'
Cc: Maureen Goodman
Subject: RE: Garland

Are you coming to court tomorrow or not? I need to let the court know.

From: Stephen Penner
Sent: Wednesday, November 04, 2009 3:31 PM
To: 'Barbara Corey'
Subject: RE: Garland

I agree we all know what the outcome will be, but it would still be nice to get it wrapped up. Oh well.

Let's say Friday at 1:30 in CDPJ to schedule the dates for (1) your dismissal motion and (2) the argument on count IV. Both after 11/14 (Ms. Cook's return). Will that work? If so, I'll contact Geri to add it to the calendar.

From: Barbara Corey [mailto:bcorey9@net-venture.com]
Sent: Wednesday, November 04, 2009 3:14 PM

To: Stephen Penner
Subject: RE: Garland

I am not sick. I have had an increase in my meds that my brain needed a little time to adjust to.

No offer has been rejected.

My plan on Friday is just to get some dates for the dismissal motion. We can cancel them if we need to but we have been chomping on the bit to present this motion.

We'll argue the firearm thing after Margaret returns, okay? We all know what the outcome will be.

B

Barbara Corey
Attorney at Law. PLLC
901 South "I" Street, #201
Tacoma, WA 98405
253.779.0844
253.272.9220(fax)

From: Stephen Penner [mailto:spenner@co.pierce.wa.us]
Sent: Wednesday, November 04, 2009 2:35 PM
To: 'Barbara Corey'
Cc: Maureen Goodman
Subject: Garland

Barbara,

Couple things:
(1) We had agreed in principal to do the closing on count IV this Friday afternoon. Then I heard you were sick. Then I heard you were in court and I got your motion for new trial. Can we go forward with the arguments this Friday?

(2) Got your motion for new trial. I understand that you had to file it within 10 days, so I'm assuming this is not a rejection of our settlement offer. I don't mind having to file a response since I was the one who insisted that the time limits be complied with, but I wanted to clarify the offer isn't being rejected. Let me know.

Steve

Exhibit 4
Post-conviction email exchange regarding plea negotiations on 04-1-05310-4
dated 05-20-2010

Steve Trinen

From: Stephen Penner
Sent: Wednesday, January 08, 2014 11:57 AM
To: Steve Trinen
Subject: FW: Garland assault case - DISCOVERY

-----Original Message-----
From: bcorey9@net-venture.com
Sent: Thursday, May 20, 2010 3:55 PM
To: Stephen Penner
Subject: RE: Garland assault case - DISCOVERY

When you see me banging my head against the wall, you will know the reason why.

Barbara Corey
Attorney at Law. PLLC
902 South 10th Street
Tacoma, WA 98405
253.779.0844
253.272-6439(fax)

-----Original Message-----
From: Stephen Penner [mailto:spenner@co.pierce.wa.us]
Sent: Thursday, May 20, 2010 3:49 PM
To: 'bcorey9@net-venture.com'
Subject: RE: Garland assault case - DISCOVERY

Okay, got it. Just let us know. Thanks.

-----Original Message-----
From: bcorey9@net-venture.com [mailto:bcorey9@net-venture.com]
Sent: Thursday, May 20, 2010 3:16 PM
To: Stephen Penner
Cc: Maureen Goodman
Subject: RE: Garland assault case - DISCOVERY

Shit, I am doing my best to convince him to take it. I am continuing to do this several times a week. Bear with me. Thanks, B

Barbara Corey
Attorney at Law. PLLC
902 South 10th Street
Tacoma, WA 98405
253.779.0844
253.272-6439(fax)

-----Original Message-----
From: Stephen Penner [mailto:spenner@co.pierce.wa.us]
Sent: Thursday, May 20, 2010 12:59 PM
To: 'bcorey9@net-venture.com'

Cc: Maureen Goodman
Subject: RE: Garland assault case - DISCOVERY

Barbara,
Could you at least have the courtesy of telling us that your client rejected the settlement offer you asked us to make?

-----Original Message-----
From: bcorey9@net-venture.com [mailto:bcorey9@net-venture.com]
Sent: Thursday, May 20, 2010 12:42 PM
To: Stephen Penner; Maureen Goodman
Subject: Garland assault case - DISCOVERY

Please provide field notes for the following officers/detectives:
Jim O'Hern
Denny Woods
Curtis Wright
Dep. John Crawford
Dep. Pat Davidson
Dep. Kyle Davis
Dep. Marylou Hanson-Obrien
Dep. Debbie Heishman
Dep. Franz Helmke
Det. Jeff Skeeter

I know that some of the individuals named above have retired, etc. However, under the sheriff's policy and procedure manual, the records belong to the department and are to be turned over to the sheriff upon departure.

Also please provide a copy of the report of Franz Helmke (ours is missing pages and the other pages are exceedingly difficult to read).

Also please provide current criminal histories on all of the state's civilian witness.

Thanks, BC

Barbara Corey
Attorney at Law. PLLC
902 South 10th Street
Tacoma, WA 98405
253.779.0844
253.272-6439(fax)

PIERCE COUNTY PROSECUTOR

January 13, 2014 - 2:07 PM

Transmittal Letter

Document Uploaded: prp2-451654-Response.pdf

Case Name: IN RE THE PRP OF: RAYMOND GARLAND

Court of Appeals Case Number: 45165-4

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: **hjohns2@co.pierce.wa.us**